No. 14-7505	*** CAPITAL CASE ***
Title:	Timothy Lee Hurst, Petitioner
	v.
	Florida
Docketed:	December 12, 2014
Lower Ct:	Supreme Court of Florida
Case Nos.:	(SC12-1947)
Decision Date:	May 1, 2014
Rehearing Denied:	September 4, 2014

Questions Presented

—Date—	——Proceedings and Orders----------
Dec 3 2014	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due January 12, 2015)
Jan 12 2015	Brief of respondent Florida in opposition filed.
Jan 29 2015	DISTRIBUTED for Conference of February 20, 2015.
Feb 23 2015	DISTRIBUTED for Conference of February 27, 2015.
Mar 2 2015	DISTRIBUTED for Conference of March 6, 2015.
Mar 9 2015	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED limited to the following question: Whether Florida's death sentencing scheme violates the Sixth Amendment or the Eighth Amendment in light of this Court's decision in Ring v. Arizona, 536 U.S. 584 (2002).
Apr 7 2015	The time to file the joint appendix and petitioner's brief on the merits is extended to and including May 28, 2015.
Apr 7 2015	The time to file respondent's brief on the merits is extended to and including July 29, 2015.
May 28 2015	Joint appendix filed (3 volumes). (Statement of costs filed.)
May 28 2015	Brief of petitioner Timothy Lee Hurst filed.
Jun 4 2015	Brief amicus curiae of American Bar Association filed.
Jun 4 2015	Brief amici curiae of Former Justices of the Supreme Court of Florida filed.
Jun 4 2015	Brief amici curiae of Former Florida Circuit Court Judges filed.
Jun 4 2015	Brief amici curiae of American Civil Liberties Union, et al. filed.
Jul 29 2015	SET FOR ARGUMENT on Tuesday, October 13, 2015.
Jul 29 2015	Brief of respondent Florida filed.
Aug 5 2015	Brief amici curiae of Alabama and Montana filed. (Distributed)
Aug 7 2015	CIRCULATED.
Aug 12 2015	Record requested from the Supreme Court of Florida.
Aug 25 2015	Record received from the Supreme Court of Florida. 1 Box.
Aug 28 2015	Reply of petitioner Timothy Lee Hurst filed. (Distributed)
Oct 13 2015	Argued. For petitioner: Seth P. Waxman, Washington, D. C. For respondent: Allen

Winsor, Solicitor General, Tallahassee, Fla.

RECORD
AND
BRIEFS

No. 14-7505

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2014

TIMOTHY LEE HURST
Petitioner
v.

STATE OF FLORIDA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

DAVID A. DAVIS
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0271543
LEON COUNTY COURTHOUSE
301 SOUTH MONROE STREET, STE 401
TALLAHASSEE, FL 32301

ATTORNEY FOR PETITIONER and
COUNSEL OF RECORD
(MEMBER OF THE BAR OF THIS COURT)

Library of Congress
Law Library

QUESTION PRESENTED

WHETHER THE FLORIDA SUPREME COURT CORRECTLY HELD THAT THE JURY IN A DEATH PENALTY CASE DOES NOT HAVE A CONSTITUTIONAL OBLIGATION TO RENDER A VERDICT IN THE PENALTY PHASE OF WHETHER THE DEFENDANT IS MENTALLY RETARDED OR NOT WHEN EVIDENCE HAS BEEN PRESENTED TO SUPPORT SUCH A CONCLUSION.

WHETHER THE SUPREME COURT OF FLORIDA HAS CORRECTLY CONCLUDED THAT THIS COURT'S DECISION IN *RING v. ARIZONA*, 536 U.S. 584 (2002) (1) HAS NO APPLICABILITY TO FLORIDA'S DEATH SENTENCING SCHEME GENERALLY, (2)THAT SPECIFICALLY IT DOES NOT REQUIRE THE JURY'S RECOMMENDATION OF DEATH BE UNANIMOUS, (3) THAT THE JURY'S FINDINGS OF AGGRAVATING FACTORS NEED NOT BE UNANIMOUS, (4) THAT THE JURY HAS NO ROLE IN DETERMINING THE FACTUAL ISSUE OF THE DEFENDANT'S MENTAL RETARDATION, AND (5) THAT THE LACK OF UNANIMITY DOES NOT OFFEND OUR EVOLVING STANDARDS OF DECENCY AS REQUIRED BY THE EIGHTH AMENDMENT?

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF CITATIONS	iii
OPINION BELOW	1
JURISDICTION OF THIS COURT	2
STATEMENT OF THE CASE	6
STATEMENT OF THE FACTS	7
REASONS TO GRANT THE WRIT	14-32

ISSUE I: WHETHER THE FLORIDA SUPREME COURT CORRECTLY HELD THAT THE JURY IN A DEATH PENALTY CASE DOES NOT HAVE A CONSTITUTIONAL OBLIGATION TO RENDER A VERDICT IN THE PENALTY PHASE OF WHETHER THE DEFENDANT IS MENTALLY RETARDED OR NOT WHEN EVIDENCE HAS BEEN PRESENTED TO SUPPORT SUCH A CONCLUSION. 14

ISSUE II: WHETHER THE SUPREME COURT OF FLORIDA HAS CORRECTLY CONCLUDED THAT THIS COURT IS DECISION IN *RING v. ARIZONA*, 536 U.S. 584 (2002) (1) HAS NO APPLICABILITY TO FLORIDA'S DEATH SENTENCING SCHEME GENERALLY, (2)THAT SPECIFICALLY IT DOES NOT REQUIRE THE JURY'S RECOMMENDATION OF DEATH BE UNANIMOUS, (3) THAT THE JURY'S FINDINGS OF AGGRAVATING FACTORS NEED NOT BE UNANIMOUS, (4) THAT THE JURY HAS NO ROLE IN DETERMINING THE FACTUAL ISSUE OF THE DEFENDANT'S MENTAL RETARDATION, AND (5) THAT THE LACK OF UNANIMITY DOES NOT OFFEND OUR EVOLVING STANDARDS OF DECENCY AS REQUIRED BY THE EIGHTH AMENDMENT? 22

CONCLUSION	33
INDEX TO APPENDIX	34
APPENDIX	

TABLE OF CITATIONS

CASES	PAGE
Anderson v. State, 841 So.2d 390 (Fla. 2003)	26
Apprendi v. New Jersey, 530 U.S. 4665 (2000)	15, 24
Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002), cert. denied, 123 S. Ct. 662 (2002)	24-28
Butler v. State, 842 So. 2d 817 (Fla. 2003)	25-26
Cherry v. State, 959 so. 2d 702 (Fla. 2007)	22
Chester v. Thaler, 666 F.3d 340, 343 (5th Cir. 2011)	21
Com. v. Hackett, 675 CAP, 2014 WL 4064039 (Pa. Aug. 18, 2014)	20
Com. v. Williams, 619 Pa. 219, 241-42, 61 A.3d 979 (2013)	19
Doorbal v. State, 837 So. 2d 940 (Fla. 2003)	27
Evans v. Secretary, Fla. Dep't of Corrections, 699 F 3d 1249 (11th Cir. 2012)	28-29
Ex parte Briseno, 135 S.W.3d 1, 8-9 (Tex. Crim. App. 2004)	21
Ex parte Perkins, 851 So. 2d 453, 456-57 (Ala. 2002)	20
Hall v. Florida, Case No. 12-10882 (May 27, 2014)	17
Hodges v. State, 55 So. 3d 515 (Fla. 2011)	15, 22
Jones v. State, 845 So. 2d 55, 77 (Fla. 2003)	27
King v. Moore, 831 So. 2d 143 (Fla. 2002), cert denied, 123 S. Ct. 657 (2002)	24-25
Lane v. State, CR-10-1343, 2013 WL 5966905 (Ala. Crim. App. Nov. 8, 2013)	20

Marshall v. Crosby, 911 So.2d 1129, 1133-1135 (Fla. 2005) 26

Peterson v. State, 94 So.3d 514, 540 (Fla.2012) 24-25, 29

Porterfield v. Tennessee, No. W2012-00753-CCA-R3-PD. (Tenn. Crim. App. May 7, 2013) 20

Proffitt v. Florida, 428 U.S. 242 (1976) 23-24

Ring v. Arizona, 536 U.S. 584, (2002) 15, 22-32

Rodriquez de Quijas v. Shearson/ American Express, 490 U.S. 477(1989) 27

Roper v. Simmons, 543 U.S. 551, 125 S.Ct. 1183 (2005) 32

Schriro v. Smith 546 U.S. 6 (2005) 16-17

Schriro v. Summerlin, 542 U.S. 348, 124 S.Ct. 2519 (2004) 31

Smith v. State, 1060427, 2007 WL 1519869 (Ala. May 25, 2007) 20

State v. Grell, 231 Ariz. 153, 158, 291 P.3d 350, 355 (2013) 21

State v. Steele, 921 So.2d 538 (Fla. 2005) 23, 27-28, 30, 32

State v. Waddy, 2011-Ohio-3154 20

Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975) 23

Trop v. Dulles, 356 U.S. 86, 100–101, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958) 32

U.S. v. Hatter, 532 U.S. 557, 567 (2001) 27

Watts v. State, 593 So. 2d 198 , 201-202 (Fla. 1992) 17

Wiley v. State, 890 So. 2d 892, 898 (Miss. 2004) 20

Ybarra v. State, 127 Nev. Adv. Op. 4, 247 P.3d 269 (2011) 21

RULES

Rule 3.851 Fla. R. Crim. P. 6

STATUTES

Section 921.137, Florida Statutes 2, 18

Section 921.141, Florida Statutes 3, 4, 24, 26, 29

OPINION BELOW

The Florida Supreme Court's opinion in this case, *Timothy Lee Hurst v. State of Florida*, 147 So. 3d 435 (Fla. 2014), is reproduced as Appendix A. The denial of his motion for rehearing is reproduced as Appendix B.

JURISDICTION

The Florida Supreme Court filed an opinion in this case on May 1, 2014 (Appendix A). and denied rehearing on September 4, 2014 (Appendix B). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257. Mr. Hurst asserted in state court and is arguing here that the State of Florida violated his constitutional rights under the Sixth, Eighth and Fourteenth Amendments.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Amendment VI to the Constitution of the United States:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

2. Amendment VIII to the Constitution of the United States:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

3. Amendment XIV, Section 1, to the Constitution of the United States, in part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within this jurisdiction the equal protection of the laws.

4. Section 921.137, Florida Statutes provides

> 921.137. Imposition of the death sentence upon an intellectually disabled defendant prohibited
>
> (1) As used in this section, the term "intellectually disabled" or "intellectual disability" means

significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18. The term "significantly subaverage general intellectual functioning," for the purpose of this section, means performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the Agency for Persons with Disabilities. The term "adaptive behavior," for the purpose of this definition, means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community. The Agency for Persons with Disabilities shall adopt rules to specify the standardized intelligence tests as provided in this subsection.

(2) A sentence of death may not be imposed upon a defendant convicted of a capital felony if it is determined in accordance with this section that the defendant is intellectually disabled.

(3) A defendant charged with a capital felony who intends to raise intellectual disability as a bar to the death sentence must give notice of such intention in accordance with the rules of court governing notices of intent to offer expert testimony regarding mental health mitigation during the penalty phase of a capital trial.

(4) After a defendant who has given notice of his or her intention to raise intellectual disability as a bar to the death sentence is convicted of a capital felony and an advisory jury has returned a recommended sentence of death, the defendant may file a motion to determine whether the defendant is intellectually disabled. Upon receipt of the motion, the court shall appoint two experts in the field of intellectual disabilities who shall evaluate the defendant and report their findings to the court and all interested parties prior to the final sentencing hearing. Notwithstanding s. 921.141 or s. 921.142, the final sentencing hearing shall be held without a jury. At the final sentencing hearing, the court shall consider the findings of the court-appointed experts and consider the findings of any other expert which is offered by the state or the defense on the issue of whether the defendant has an intellectual disability. If the court finds, by clear and convincing evidence, that the defendant has an intellectual disability as defined in subsection (1), the court may not impose a sentence of death and shall enter a written order that sets forth with specificity the findings in support of the determination.

(5) If a defendant waives his or her right to a recommended sentence by an advisory jury following a plea of guilt or nolo contendere to a capital felony and adjudication of guilt by the court, or following a jury finding of guilt of a capital felony, upon acceptance of the waiver by the court, a defendant who has given notice as required in subsection (3) may file a motion for a determination of intellectual disability. Upon granting the motion, the court shall proceed as provided in subsection (4).

(6) If, following a recommendation by an advisory jury that the defendant be sentenced to life imprisonment, the state intends to request the court to order that the defendant be sentenced to death, the state must inform the defendant of such request if the defendant has notified the court of his or her intent to raise intellectual disability as a bar to the death sentence. After receipt of the notice from the state, the defendant may file a motion requesting a determination by the court of whether the defendant is intellectually disabled. Upon granting the motion, the court shall proceed as provided in subsection (4).

(7) Pursuant to s. 924.07, the state may appeal a determination of intellectual disability made under subsection (4).

(8) This section does not apply to a defendant who was sentenced to death before June 12, 2001.

(9) For purposes of the application of the criminal laws and procedural rules of this state to any matters relating to the imposition and execution of the death penalty, the terms "intellectual disability" or "intellectually disabled" are interchangeable with and have the same meaning as the terms "mental retardation" or "retardation" and "mentally retarded" as those terms were defined before July 1, 2013.

5. Section 921.141, Florida Statutes provides in part:

Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.

(1) Separate proceedings on issue of penalty.--Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or the defendant's counsel shall be permitted to present argument for or against sentence of death.

(2) Advisory sentence by the jury.--After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) Findings in support of sentence of death. --Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating

circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence within 30 days after the rendition of the judgment and sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

* * * * *

(5) Aggravating circumstances.--Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment or placed on community control or on felony probation.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any: robbery; sexual battery; aggravated child abuse; abuse of an elderly person or disabled adult resulting in great bodily harm, permanent disability, or permanent disfigurement; arson; burglary; kidnaping; aircraft piracy; or unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(j) The victim of the capital felony was a law enforcement officer engaged in the performance of his or her official duties.

(k) The victim of the capital felony was an elected or appointed public official engaged in the performance of his or her official duties if the motive for the capital felony was related, in whole or in part, to the victim's official capacity.

(l) The victim of the capital felony was a person less than 12 years of age.

(m) The victim of the capital felony was particularly vulnerable due to advanced age or disability, or because the defendant stood in a position of familial or custodial authority over the victim.

(n) The capital felony was committed by a criminal street gang member, as defined in s. 874.03.

(6) Mitigating circumstances.--Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme

mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his or her participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

(h) The existence of any other factors in the defendant's background that would mitigate against imposition of the death penalty.

STATEMENT OF THE CASE

On May 2, 1998, the Appellant, Timothy Hurst, was convicted of one count of first degree murder and sentenced to death. The Florida Supreme Court affirmed that conviction and sentence. *Hurst v. State*, 819 So. 2d 689 (Fla. 2002).

He then filed a motion for post-conviction relief pursuant to Rule 3.851 Fla. R. Crim. P., which the trial court denied. On appeal, the State High Court granted partial relief, vacated the sentence of death, and remanded for a new sentencing hearing before a jury. *Hurst v. State* 18 So. 3d 975 (Fla. 2009).

On remand, Hurst filed a "Motion to Declare Defendant's Mental Retardation as a Bar to Execution and Request for Hearing" (2 R 309–12), which the court denied (2 R 313-17).

Hurst proceeded to the sentencing phase trial, and the jury, after it had heard the evidence, arguments, and instructions on the law, recommended the court impose a sentence of death by a vote of 7-5 (3 R 463). The court followed that verdict, and justifying a sentence of death it found in aggravation that:

1. Hurst committed the murder during the course of a robbery. Great weight.

2. The murder was especially heinous, atrocious, or cruel. Great weight.

(3 R 577-78).

The court found the following statutory mitigators:

1. Hurst has no significant history of prior criminal activity. Moderate weight

2 The age of the defendant at the time of the crime. Moderate weight.
(3 R 579, 582-83)

It also found as non-statutory mitigation that the defendant has limited intellectual capacity.

The court may have found Hurst suffered from Fetal Alcohol Syndrome, had widespread abnormalities in his brain, "including the frontal lobe area, which is crucial to judgment and impulse control." If so, it did not explicitly consider this as mitigation and assign them any weight (3 R 583-85).

On appeal, the Supreme Court of Florida affirmed Hurst's convictions and sentences. *Hurst v. State*, 147 So. 3d 435 (Fla. 2014). (Appendix A) It also denied his motion for Rehearing. (Appendix B) Hurst now asks this Court to consider his case, and grant his petition for a Writ of Certiorari to the Supreme Court of Florida.

STATEMENT OF THE FACTS

On May 2, 1998, Hurst and Cynthia Harrison worked a Popeye's restaurant on Nine Mile Road in Escambia County. She was later found bound and murdered there, and shortly the police suspected Hurst of the crime. He had told a friend he had done so, and produced a thousand dollars, which had come from the store (6 R 344-46). When questioned by the police he essentially denied killing Harrison (9 R 750, 752-53).

When he presented his penalty phase defense Hurst called his parents, sisters, and teachers who knew him. Three experts also testified about the defendant's damaged brain and mental

retardation.

Bertha Bradley was Hurst's mother and she was 15 years old when she gave birth to Timothy (7 R 536). Throughout the pregnancy, she drank continuously "From the time I get up until the time I go to bed," every day (7 R 536). She had, as she said, a "taste for it." (7 R 536) Because of that, and that she loved to go out and leave him, the "court people" took her infant son away from her, but only for about three weeks (7 R 537).[1]

As Hurst grew, it became obvious that he was "slow, very slow." (7 R 537). When he talked he tended to slur his words, and even as an adult "He still talks funny." (7 R 538). He took a very long time to learn how to walk (7 R 538), and predictably he did poorly in school no matter how hard he tried (7 R 539). Rather than putting him in special education classes, his mother insisted that he be treated as a normal child so he would not be picked on, which happened anyway (7 R 539). He apparently never got in trouble at school, probably because he stayed away and would not go to class (7 R 541).

Nonetheless, he was a good child, and the mother had "no problem" with him (7 R 541). But he could not dress himself appropriately for the weather, and his mother had to do it for him (7 R 542). He could not match his clothes, take a shower without being told, could not manage money, did not know how to go places without someone going with him, could not keep appointments, and use a bus (7 R 542-43).

He even did not have a good idea how to act at a restaurant. One time the family went to a buffet style restaurant, and instead of putting food on his plate, "he just went up there and took the

---

[1]Mrs. Bradley also drank when she was pregnant with her other sons, and they also dropped out of school (7 R 548).

whole tray and started eating. "That's what he thought he was supposed to do." (7 R 544)

Hurst's father echoed much of what the defendant's mother had said. He developed slower than his younger sister, and he could not complete a list of tasks given to him without someone checking on him (7 R 516-17). He did poorly in school, never mastering either multiplication or division, and he "hardly ever read anything." (7 R 517) He could not complete a job application, he never had a bank account and could not manage his money. Instead his father had to do it for him (7 R 518). He could not cook for himself, even if the instructions were on the box. The father did acknowledge that if someone stood by him he could probably follow the measurements in the instructions (7 R 519). Similarly, he could not follow directions, and even if he had a map "he would have to call and someone would have to give him more instructions." (7 R519-20).

Hurst's mother would keep most of his clothes clean, and someone would have to remind him to clean himself (7 R 520-21). If he had to make an appointment, if someone did not remind him of it, he would probably miss it (7 R 521). Mr. Bradley also helped him buy a car, or rather, he bought the car for him, apparently after he got a driver's license (7 R 522-23). His mother, however, refused to ride with him because he always drove too slow. "[T]he rest of the traffic going 60, he' either going 25 or going 30." (7 R 543)

Men who had known Hurst while he was in high school also testified at the sentencing hearing. Calvin Harris, a high school administrator, came into regular contact with him. "Well, Tim didn't like going to class, and part of the problem was Tim was low functioning."(7 R 555) Most of the time when Mr. Harris searched for him, he would be at the gym playing basketball, something the coaches allowed because they "knew his academics wasn't up to par." (7 R 555) He was told he could not skip classes, but if he decided he was not going to class, he would "head straight to the

gymnasium to play basketball." (7 R 555). When Mr. Harris looked at his records he found out that although he was in high school, he had been socially promoted since middle school (7 R 556). Hurst could not even pass the High School Equivalency Test after taking it twice, something only about 3-5 percent of the student population failed. Harris believed his former student was at the maturity level of a 5th, 6th, or 7th grade student (7 R 557).

Jerome Chism, the principal at the East Charter School, also knew Hurst as a student, and saw him on a day to day basis (7 R 560). Students referred to his school typically were low achievers or behavior problems (7 R 560). Accordingly, Hurst, who was 18 or 19 when Chism knew him, behaved more like a 12 or 13 year old child, and at times, had to be disciplined because of inappropriate behavior (7 R 560). He had an attention span "about 59seconds" and was teased by other kids at the school "quite often." (7 R 761)

Mr. Chism also vaguely recalled Hurst's 15 year old friend, "Lee-Lee" Smith, who would often come to school to pick him up (7 R 562). Of the two boys Smith would "definitely" be the leader and Hurst the follower (7 R 562).

Dr. Joseph Wu, an expert on the PET scan, which takes "pictures" of the brain from which he could tell if the patient suffered any type of neurological and psychiatric disorders (8 R 576) examined Hurst, and discovered "several abnormalities with his scan." (8 R 602). First, he had widespread damage to his brain in the cortical region (8 R 602). Second, there was much less brain activity in the front portion of the brain than in the back (8 R 605). To Dr. Wu, this meant that with frontal lobe damage, that Hurst had significant deficits in his judgment and impulse control, thinking and cognition, and memory problems. "They are also going to have problems with judgment and the ability to regulate impulses."

> And so you can have behaviors that can result in problems, like a learning impairment, like ADD type appearances, and so-so -brain increase of risk is having impairment in impulse control and judgment, as well as some problems with learning and memory. .When you have damage to the frontal lobe, you're going to have impairment and [an in]ability to regulate aggression.

(8 R 607-608)

He also said that people with damaged brains early in life are at a higher risk for acting out later in life (8 R 611). More specifically relevant to Hurst, the brain scan he saw of his was similar to that reported in people with Fetal Alcohol Syndrome (8 R 612).

Dr. Harry Krop, a psychologist, administered the Weschler Adult Intelligence Scale, Fourth Revision(WAIS IV) to Hurst in January 2012 to determine his IQ. It was 69 (8 R 632). Several days later, he also administered the "Adaptive Behavior Assessment System," to measure Hurst' functioning in the community, school, at home, and other areas (8 R 627-29). In the four categories measured by this assessment, he "came out significantly deficient." (8 R635-36) In school he had a 1.2 grade point average, repeated 10th grade, and should have been in special education classes (8 R 637-38).

Dr. Krop, therefore, concluded that Hurst was mentally retarded, because "his overall thinking and reasoning abilities exceed those of only approximately two percent of the individuals his age." (8 R 637) He simply could not keep up with peers in situations requiring thinking and reasoning ability (8 R 637).

He also acknowledged that Dr. James Larson and a Dr. McClain had evaluated Hurst in 2003 using the WAIS III and concluded that he had an IQ between 77-78, clearly outside the retarded range (8 R 648-49).

After conducting some neuropsychological testing, Dr. Krop also concluded he was low

average on most of those tests, and had either a borderline or mild impairment of his brain (8 R 639). In all likelihood, he had frontal temporal lobe damage, which is the part of the brain that controls such "executive" functions as problem solving, judgment, impulse control, and inhibition (8 R 640). Moreover, because males mature later than females, even normally developed males 18 or 19 years old have frontal lobes that at that age are not fully developed, so they "take more risks, don't think ahead, and there inhibitions are lower and so forth." (8 R 640)

Dr. Gordon Taub specialized in the measurement of intelligence, and he was a coordinator for the Psychological Corporation, which published the Weschler Scales (8 R 637). He had, accordingly done hundreds and perhaps thousands of the WAIS series tests (8 R 658-59).

In particular he testified about the several shortcomings of the WAIS III, the test Drs. Larson and McClain had used in 2004 to measure Hurst's IQ. Generally, studies have shown that the scores on the WAIS III increased by about 1/3 point per year since its introduction in 1981 (8 R 666). In Hurst's case, that meant that if he took the test in 1996, or 15 years after its first use, his IQ would be about 5 points higher than it should have been (8 R 666). In addition, the test itself was flawed in that several of the subtests essentially measured the same thing, and hence skewed the result (8 R 668). The test, as it turned out, also failed to adequately identify those in either the high end or low end of the intelligence scale (8 R 670). Specifically, it tended to under identify those who might be mentally retarded. Finally, the WAIS IV in contrast to the WAIS III represented the most recent scholarship on intelligence, and the WAIS III. In fact all other intelligence tests were developed based on our understanding of the human brain as it was understood in 1939 (8 R 669). The WAIS IV, on the other hand, updated the norms that had reflected the inflated IQ scores, and incorporated the technological and theoretical advances in the understanding of intelligence since 1939 and

especially 1997, which resulted in a significant improvement of the WAIS III and a more reliable measure of a person's intelligence (8 R 671-75, 678).

Hence, when Dr. Taub re-examined the WAIS III results for the evaluation given Hurst in 2004, he adjusted the full scale IQ from 78 to 69 (8 R 680).

Now, Dr. Taub also looked at his adaptive deficits scores, and they were "all very, very low." (8 R 684). He appeared to be "very impaired as well as far as self-caring and taking care of himself, communication." (8 R 685) Generalizing, he also said that the mentally retarded are not totally nonfunctional. Their ability to process information quickly is weak. "Their ability to hold information in their mind and do something with it is impaired." (8 R 698) "But realistically when we talk about mild retardation, we're looking at somebody like Forrest Gump. You can't tell a difference by looking at him. You can't even tell by engaging in casual conversation." (8 R 703) This meant that in Hurst's case, he could hold a job if the tasks were repetitious, and he could drive a car (8 R 726). As to the latter skill, Dr. Taub did note that when Hurst drove it was "very, very slow," and he was "kind of scary" to be with (8 R 726).

As a result, Dr. Taub concluded that Hurst met the "legal criteria for mental retardation." (8 R 716)

Rebutting Hurst's mental retardation defense, the State called Dr. Harry McClaren. He admitted that the WAIS IV he had administered was unreliable because the same the defendant had been given that test a month earlier, and was hence unreliable because of the so-called "practice effect." (8 R 740). Instead, he relied on the WAIS III test administered several years earlier by Dr. Larson, finding it "Probably the most important one[]." (8 R 735) It had determined the defendant had an IQ of 76-78 (R). Then, "factoring all that information into your examination," Dr. McClaren

concluded that not only did Hurst have an IQ above the retarded range, he also did not have significant deficits in his adaptive behavior (8 R 738-39).

He based this conclusion on several facts. First, he had never been given any intelligence testing by the Escambia County school system, despite "coming to the attention of exceptional student services for a language disorder." (8 R 738) For that disability, he received attention for several years, but now his speech has become indistinct because he has had several teeth pulled (8 R 738). He also discounted any conclusion of significant deficits in adaptive behavior because it was not directly assessed by people that were living with him and knew him in any standardized way. Instead, "We have heard anecdotes and attempts to use the test of adaptive behavior, but you're asking people to go back in time 14 years . . . what they thought he usually did or did not do. So there is not information to support that." (8 R 738). In short, Dr. McClaren thought he may have had some "cognitive deficits that contribute to having stuttered as a child. I've noticed some tics in his eyebrows that could be neurological. . . But I do not believe he is mentally retarded." (8 R 739).

REASONS TO GRANT THE WRIT

ISSUE I

WHETHER THE FLORIDA SUPREME COURT CORRECTLY HELD THAT THE JURY IN A DEATH PENALTY CASE DOES NOT HAVE A CONSTITUTIONAL OBLIGATION TO RENDER A VERDICT IN THE PENALTY PHASE OF WHETHER THE DEFENDANT IS MENTALLY RETARDED OR NOT WHEN EVIDENCE HAS BEEN PRESENTED TO SUPPORT SUCH A CONCLUSION.

At the sentencing phase of Hurst's capital trial. Hurst presented extensive evidence and argued to the jury that he was mentally retarded. It was, however, never instructed that if it found him to suffer from that intellectual disability, it had to recommend a sentence of life. On appeal to

the Florida Supreme Court Hurst argued, among other mental retardation issues, that failure violated the Eighth Amendment, and under that law, it had an obligation to determine whether he was mentally retarded and hence ineligible for execution. The Florida Supreme Court rejected that argument:

> Although Hurst was allowed to present all his mental retardation and other mental mitigation to the jury, he also contends that the trial court erred in refusing to submit the question of mental retardation as a bar to the death penalty to the jury for its determination. This claim lacks merit. We have repeatedly held that a defendant has no right under *Atkins* to a jury determination of whether he is mentally retarded. *See Hodges v. State*, 55 So.3d 515, 526 (Fla.2010) (holding that defendant is not entitled to a jury determination of his mental retardation status), *cert. denied*, — U.S. —, 132 S.Ct. 164, 181 L.Ed.2d 77 (2011); *Kilgore v. State*, 55 So.3d 487, 510–11 (Fla.2010) (reiterating that the capital defendant has no right under *Atkins* to a jury determination whether he is mentally retarded); *Rodriguez v. State*, 919 So.2d 1252, 1267 (Fla.2005) (same). Some states have established procedures under which a jury does determine if a capital defendant is mentally retarded. *See, e.g., Commonwealth v. Sanchez*, 614 Pa. 1, 36 A.3d 24, 60–61 (2011) (discussing survey of state law on procedures for determining mental retardation in capital cases). Florida is not one of those states, and *the United States Supreme Court has not mandated any specific procedure for making the determination of mental retardation in the capital sentencing context.* Thus, the trial court did not err in refusing to submit to the jury the question of Hurst's mental retardation as a bar to the death penalty in this case.

Hurst 147 So. 3d at 445(Emphasis supplied.)

First, under this Court's opinion in *Apprendi v. New Jersey*, 530 U.S. 4665 (2000) and *Ring v. Arizona*, 536 U.S. 584, (2002) the jury must find those facts essential to determine whether a defendant should live or die: "The fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives—whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—must be found by a jury." Ring v. Arizona, 536 U.S. at 610 (Scalia, J., concurring). Whether

a defendant is mentally retarded or not is a factual issue and hence, under those cases, must be resolved by the jury. The State High Court simply is wrong to rule otherwise.

Other states have followed Florida's lead.[2] Others have not and leave it for a jury to decide

[3] See Lieutenant Jessica Hudson, JAGC, USN, Ensign Kyle Fralick, JAGC, USN, First Lieutenant John A. Sautter, USMC, Lightning but No Thunder: The Need for Clarity in Military Courts Regarding the Definition of Mental Retardation in Capital Cases and for Procedures in Implementing Atkins v. Virginia, 55 Naval L. Rev. 359, 388-89 (2008).

Moreover, some courts have held that this Court has already resolved this issue. *Schriro v. Smith* 546 U.S. 6 (2005).[4] In that case, this Court summarily reversed a Ninth Circuit Court of

---

[2]*See e.g.*. Morrow v. State, 928 So.2d 315 (Ala. Crim. App. 2004); Ariz. Rev. Stat. Ann. § 13-703.02 (2007); Ark. Code. Ann. § 5-4-618 (West 2006); Ca. Penal Code § 1376 (West 2007); Colo. Rev. Stat. Ann. § 18-1.3-1102 (West 2007); Del. Code Ann. tit. 11 § 4209 (2007); Idaho Code Ann. § 19-2515A (2007); 725 Ill. Comp. Stat. Ann. 5/114-15 (West 2007); Ind. Code Ann. § 35-36-9-3 (West 2007); Ind. Code Ann. § 35-36-9-4 (West 2007); Ky. Rev. Stat. Ann. § 532.135 (West 2006); La. Code Crim. Proc. Ann. art. 905.5.1 (2006); Chase v. State, 873 So.2d 1013 (Miss. 2004); Nev. Rev. Stat. Ann. § 174.098 (West 2005); State v. Jimenez, 908 A.2d 181 (N.J. 2006); State v. Flores, 93 P.3d 1264 (N.M. 2004); N.C. Gen. Stat. Ann. § 15A-2005 (West 2007); State v. Lott, 779 N.E.2d 1011 (Ohio 2002); Okla. Stat. Ann. tit. 21 § 701.10b (West 2007); Franklin v. Maynard, 588 S.E.2d 604 (S.C. 2003); S.D. Codified Laws § 23A-27A-26.3 (2007); Tenn. Code Ann. § 39-13-203 (West 2003); State v. Smith, 893 S.W.2d 908, 916 (Tenn. 1994); and Utah Code Ann. § 77-15a-104 (West 2007).

[3]See, e.g., Va. Code Ann. § 19.2-264.3:1.1© (Cum. Supp. 2010).
See, e.g., Ca. Penal Code § 1376 (West 2007); Del. Code Ann. tit. 11 § 4209 (2007); La. Code Crim. Proc. Ann. art. § 905.5.1 (2006); Md. Code Ann., Crim. Proc. § 4-343 (West 2007); and 18 U.S.C. § 3592 (2007).

[4]*People v. Jackson*, 45 Cal. 4th 662, 679-80, 199 P.3d 1098, 1109 (2009); *Gallo v. State*, 239 S.W.3d 757, 770 (Tex. Crim. App. 2007); *State v. Laney*, 367 S.C. 639, 647-49, 627 S.E.2d 726, 731 (2006)

Appeals decision that. It did not, as some state courts have held, hold that a jury need not determine a defendant's mental retardation. Instead, its simply told the Ninth Circuit that it had ruled too soon on the necessity of a jury's determination. States, including Arizona, have responded to that challenge by adopting their own measures for adjudicating claims of mental retardation. While those measures might, in their application, be subject to constitutional challenge, Arizona had not even had a chance to apply its chosen procedures when the Ninth Circuit pre-emptively imposed its jury trial condition Schriro at pp. 7-8.

Hence, *Schriro*'s summary reversal addressed a minor procedural deficiency of the lower appellate court. It did not rule on the very significant 8th Amendment issue of whether a jury has a constitutional duty to pass on the defendant's intellectual state as a bar to being executed. Nonetheless, those decisions do clearly indicate some persistent confusion and diversity on the necessity of having a jury determine if a capital defendant is mentally retarded.

This is not the first instance where the Florida Supreme Court has got it wrong regarding the deceptively simple three prong test to determine if a capital defendant is mentally retarded. In the recent case of *Hall v. Florida*, Case No. 12-10882 (May 27, 2014), this Court found that the Florida Supreme Court's extremely narrow definition of the IQ requirement for a person to be considered intellectually disabled violated the Eighth Amendment. The State High Court took the position that if a defendant had an IQ of 70 or above, he or she could not be mentally retarded. It did so, despite evidence that IQ testing was imprecise, and standard medical practice allowed for margins of error that could reasonably push a intellectually disabled defendant's IQ higher. Thus, a defendant with an IQ between 65 and 71 was not so disabled. *Watts v. State*, 593 So. 2d 198 , 201-202 (Fla. 1992)

The state Supreme Court has applied similar narrow reasoning to the second prong of the

mental retardation test. That element requires the defendant to have "significant deficits in adaptive behavior." §921.137 Fla. Stat. (2012). Instead of determining if he or she has those significant deficits, the Supreme Court has reversed the analysis and held that if he or she can function like a person with an average IQ in certain areas they are not mentally retarded, even though they may have significant deficits.

> The trial court concluded in the sentencing order that Hurst was able to maintain a job and had acquired a driver's license. The court noted that Hurst's statement to police and his efforts to conceal his involvement in the crime were particularly persuasive in determining that Hurst did not suffer significant deficits in adaptive functioning. The court stated, "The statement, given shortly after the crime, reveals an individual clearly recounting a morning's events, giving directions, recalling telephone numbers, and deliberately omitting certain information tending to incriminate him. Similarly, the evidence offered at trial suggests that Defendant took numerous steps to conceal his involvement in the crime by attempting to clean the murder scene, having his clothes washed, hiding the money in another location, discarding Ms. Harrison's belongings and his shoes, and buying new shoes." We also note that evidence that Hurst was a nineteen-year-old who still lived at home and allowed his mother and sister to cook for him and do his laundry does not establish that he is unable to care for himself. Because the trial court had before it competent, substantial evidence to support its conclusion that Hurst is not mentally retarded under the three-prong test set forth in Florida law, we find no error in this ruling.

Hurst, 147 So. 3d at 445.

Rather than looking for adaptive deficits, as §921.137 Fla. Stat. requires, the Florida Supreme Court has determined that because the defendant can function "normally" in several other areas, he is not mentally retarded. Under that approach, no one with an IQ less than 70 will ever be found mentally retarded.

That is, as the American Association for Intellectual Disabilities, the leading national organization on mental retardation has noted

> Within an individual, limitations often coexist with strengths. This means that people with mental retardation are complex human beings who likely have certain gifts as well

> as limitations. Like all people, they often do some things better than other things. Individuals may have capabilities and strengths that are independent of their mental retardation. These may include strengths in social or physical capabilities, strengths in some adaptive skill areas, or strengths in one aspect of an adaptive skill in which they otherwise show an overall limitation . .

AAIDD, User's Guide: Mental Retardation Definition, Classification and Systems of Supports 12 (10th ed. 2007) . p. 8.

Thus, focusing on what the mentally challenged defendant can do almost guarantees he will never be found mentally retarded, as the Supreme Court of Florida's decision in this case clearly demonstrates. Indeed, as just quoted, the Court, after listing what Hurst could do, qualified itself as an expert on intellectual disabilities and specifically rejected a few details of his life as evidence of his deficits as proving much, and it explicitly rejected testimony that "as a nineteen-year-old who still lived at home and allowed his mother and sister to cook for him and do his laundry" as proof he "is unable to care for himself." *Id.* at page 18 The State high court, therefore, has warped the analysis to virtually guarantee no mentally retarded defendant will ever be found as such.

Florida's approach reflect the analytical quagmire existing in state and federal courts regarding the analytical framework for deciding if a defendant suffers from adaptive deficits. Some have used the "deficits in adaptive behavior" approach mandated by their state's statutory definition of mental retardation, which requires a defendant, in addition to having a significant intellectual deficit, to also exhibit significant deficits in their adaptive behavior. *Com. v. Williams*, 619 Pa. 219, 241-42, 61 A.3d 979, 992-93 (2013)("[T]he focus should be on an individual's weaknesses—not his or her strengths—as mentally retarded people can function in society and are able to obtain and hold low-skilled jobs, as well as have a family. This is represented in the DSM–IV and AAIDD's definitions by an individual's classification as mentally retarded even though he may have relatively

strong skills in distinct categories.")

Florida and other states, on the other hand, have ignored their states' definition of mental retardation, and the AAIDD's recognition that the intellectually disabled can also have significant abilities, and have said that because a defendant showed "sufficient" signs of being able to function in the world he or she was not mentally retarded. *Wiley v. State*, 890 So. 2d 892, 898 (Miss. 2004)("Wiley was a normal, productive citizen, who was never characterized as 'mentally retarded' until such time as being mentally retarded became critically important in the realm of post-conviction relief."); *Ex parte Perkins*, 851 So. 2d 453, 456-57 (Ala. 2002)(" Perkins was able to have interpersonal relationships. Indeed, he was married for 10 years. He maintained a job as an electrician for a short period."); *Com. v. Hackett*, 675 CAP, 2014 WL 4064039 (Pa. Aug. 18, 2014); *Porterfield v. Tennessee*, No. W2012-00753-CCA-R3-PD. (Tenn. Crim. App. May 7, 2013); *Smith v. State*, 1060427, 2007 WL 1519869 (Ala. May 25, 2007)(Court of Criminal Appeals erred by placing great emphasis on new evidence that tended to show deficits in Smith's intellectual functioning and adaptive behavior before he reached the age of 18, while ignoring evidence that shows that Smith's intellectual functioning and adaptive behavior as an adult places him above the mentally retarded range."); *Lane v. State*, CR-10-1343, 2013 WL 5966905 (Ala. Crim. App. Nov. 8, 2013)(What a defendant does after committing a crime can show that he does not have significant adaptive deficits.); *State v. Waddy*, 2011-Ohio-3154 "The record in this case arguably contains evidence that appellant exhibits limitations in adaptive behavior. The trial court, however, concluded that any adaptive deficits were primarily associated with anti-social traits, a view expressed by Dr. Smalldon.")

Other States have also ignored the narrow focus of the definition of mental retardation and have somehow been able to weigh a defendant's adaptive deficits against his or her adaptive strengths and concluded that they do or do not qualify as mentally retarded. *State v. Grell*, 231 Ariz. 153, 158, 291 P.3d 350, 355 (2013)("Grell's occasional ability to behave is not conclusive of his adaptive skills."); *Ybarra v. State*, 127 Nev. Adv. Op. 4, 247 P.3d 269, 284-85 (2011) typifies this approach:

> The district court also concluded that Ybarra failed to present sufficient evidence to establish significant adaptive behavior deficits that manifest during the developmental period. As to Ybarra's adaptive behavior before age 18, the district court concluded that minimal evidence supported any adaptive deficits. The court specifically found incredible Dr. Schmidt's conclusion that bullying by school peers and poor academic performance indicated an adaptive deficit, and instead found that Ybarra's academic and social problems could also be explained by his alcohol and drug abuse, as the other defense expert (Dr. M. Young) acknowledged. Also Ybarra managed to attend night school to secure his adult education diploma while maintaining employment, and even though he held only menial or minimum-wage jobs, persons under 18 typically hold menial jobs and that Ybarra worked as a forklift driver for several years. The district court also found unpersuasive Dr. Schmidt's reliance on the lack of evidence that Ybarra lived independently, at least before the age of 18, as proof of adaptive deficits because most children do not live independently before the age of 18.)

Ybarra v. State, 127 Nev. Adv. Op. 4, 247 P.3d 269, 280 (2011)

Finally, other states, with Texas being the lead in this area, have ignored their state's definition of mental retardation altogether and created a list of factors to "aid" the judge in determining if the defendant before him or her qualifies as mentally retarded.[5] *Ex parte Briseno*, 135 S.W.3d 1, 8-9 (Tex. Crim. App. 2004); *Chester v. Thaler*, 666 F.3d 340, 343 (5th Cir. 2011)("The *Briseno* factors remain[] the only legal guidance for lower Texas courts in applying

---

[5]By creating this list, the Texas Court of Criminal Appeals has somehow become an expert on mental retardation with a wisdom that trumps that of the AAIDD.

the AAMR definition and determining the presence or absence of 'significant deficits in adaptive behavior.'")

The split among the states and federal courts regarding the correct way to analyze the second prong of the mental retardation definition requires this Court's attention to sort out and resolve. Florida clearly has consistently used the approach followed in this case in other death penalty cases raising the mental retardation issue, and other states and federal courts are similarly applying the incorrect analysis to the issue. *Hodges v. State*, 55 So. 3d 515 (Fla. 2011); *Cherry v. State*, 959 so. 2d 702 (Fla. 2007)

This Court should accept jurisdiction in this case to provide clarity in the analysis of a defendant's intellectual disability.

ISSUE II

WHETHER THE SUPREME COURT OF FLORIDA HAS CORRECTLY CONCLUDED THAT THIS COURTÜS DECISION IN RING v. ARIZONA, 536 U.S. 584 (2002) (1) HAS NO APPLICABILITY TO FLORIDA'S DEATH SENTENCING SCHEME GENERALLY, (2)THAT SPECIFICALLY IT DOES NOT REQUIRE THE JURY'S RECOMMENDATION OF DEATH BE UNANIMOUS, (3) THAT THE JURY'S FINDINGS OF AGGRAVATING FACTORS NEED NOT BE UNANIMOUS, (4) THAT THE JURY HAS NO ROLE IN DETERMINING THE FACTUAL ISSUE OF THE DEFENDANT'S MENTAL RETARDATION, AND (5) THAT THE LACK OF UNANIMITY DOES NOT OFFEND OUR EVOLVING STANDARDS OF DECENCY AS REQUIRED BY THE EIGHTH AMENDMENT ?

The Florida Supreme Court made five related errors that require this Court's attention. First, it persists in holding that this Court's opinion in *Ring v. Arizona*, 536 U.S. 584 (2002), has no controlling authority in this state. Second, a bare majority of that Court has also continued to hold that a jury that recommends a defendant be sentenced to death need not unanimously do so, third,

nor does it also have to unanimously find the aggravating factors on which it based its death recommendation. Indeed, in this case only 7 of the 12 jurors recommended he die and we simply do not know what aggravating factors they found, by what vote they did so, or whether a majority agreed on which aggravators justified a death recommendation. Fourth, as argued above, it has said the jury has no fact finding role in determining if the defendant is mentally retarded. Finally, it has ignored the Eighth Amendment violations by not requiring jury unanimity for either its death recommendation or in finding applicable aggravating factors.[6]

This Court should accept jurisdiction in this case to resolve these multiple, lingering problems.

1. *Ring* has no application to Florida's death penalty scheme.

Florida has split its death sentencing procedure between the judge and jury. The jury, after it has heard the evidence justifying and mitigating a sentence of death, is instructed that it can recommend the trial judge impose a death sentence if the applicable statutorily defined aggravators outweigh whatever mitigation exists. *Proffitt v. Florida*, 428 U.S. 242 (1976). The court, giving that recommendation "great weight," *Tedder v. State*, 322 So. 2d 908, 910 (Fla. 1975), then also analyzes the aggravating and mitigating factors, and independently decides whether to impose a life or death sentence. There is, under Florida law, no requirement that 1. The jury unanimously find the applicable aggravators, or 2. That its recommendation of death also be unanimous. Those deficiencies lie at the heart of what Hurst asks this Court to correct.

---

[6]The state high court, despite its holding on this issue in this case and others, has, nonetheless, asked the Florida legislature to require unanimous death recommendations, State v. Steele, 921 So.2d 538, 548 -550 (Fla., 2005), but it has steadfastly refused to amend Florida's death penalty law to do so.

In *Apprendi v. New Jersey*, 530 U.S. 446 (2000), this Court held that any fact, other than a prior conviction, which increases the maximum penalty for a crime must be submitted to the jury and proved beyond a reasonable doubt. In *Ring v. Arizona*, 536 U.S. 584 (2002), following the principles in *Apprendi*, this Court held capital defendants are entitled to a jury determination "of any fact on which the legislature conditions" an increase of the maximum punishment to a sentence of death.

In 2002, the Florida Supreme Court held that this Court's ruling in *Ring* has no relevance to Florida's death penalty scheme. In *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002), cert. denied, 123 S. Ct. 662 (2002), and *King v. Moore*, 831 So. 2d 143 (Fla. 2002), cert denied, 123 S. Ct. 657 (2002), it rejected all *Ring* challenges noting that this Court had upheld Florida's capital sentencing statute several times and the state supreme court had no authority to declare it unconstitutional in light of this Court's repeated approval:

> Significantly, the United States Supreme Court repeatedly has reviewed and upheld Florida's capital sentencing statute over the past quarter of a century, [FN4] and although Bottoson contends that there now are areas of "irreconcilable conflict" in that precedent, the Court in Ring did not address this issue.
>
> ---
>
> FN4 See, e.g., Hildwin v. Florida, 490 U.S. 638, 109 S. Ct. 2055, 104 L. Ed. 2d 728 (1989); Spaziano v. Florida, 468 U.S. 447, 104 S. Ct. 3154, 82 L. Ed. 2d 340 (1984); Barclay v. Florida 463 U.S. 939, 103 S. Ct. 3418, 77 L. Ed. 2d 1134 (1983); Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976).

Bottoson, at 695.

On appeal to the State high court, Hurst challenged the constitutionality of Florida's death penalty statute, Section 921.141, Florida Statutes, under Ring, but a bare majority of the court rejected his claim.

> We previously rejected the invitation to revisit our decisions in *Bottoson* and *King* in *Peterson v. State*, 94 So.3d 514 (Fla.), *cert. denied*, — U.S. ——, 133 S.Ct. 793, 184 L.Ed.2d 586 (2012), a case which also did not involve conviction for a prior violent

> felony or a contemporaneous enumerated felony, and did not involve a unanimous jury advisory verdict. There, the majority stated, "We have consistently rejected claims that Florida's death penalty statute is unconstitutional." Id. at 538 (citing Baker v. State, 71 So.3d 802, 823–24 (Fla.2011), *cert. denied*, — U.S. —, 132 S.Ct. 1639, 182 L.Ed.2d 238 (2012); *Darling v. State*, 966 So.2d 366, 387 (Fla.2007); *Frances v. State*, 970 So.2d 806, 822 (Fla.2007)). Similarly, in *Butler v. State*, 842 So.2d 817, 834 (Fla.2003), this Court rejected the *Ring* claim where there was no aggravating factor based on a prior violent felony conviction and there was no unanimous jury advisory sentence. *See also Ault v. State*, 53 So.3d 175, 206 (Fla.2010) ("[T]his Court has repeatedly and continually rejected such claims" that the advisory verdict must be unanimous); *Coday v. State*, 946 So.2d 988, 1006 (Fla.2006) (reiterating that it is not unconstitutional for a jury to be allowed to recommend death by a simple majority vote). We continue to adhere to this same body of precedent.

Hurst, 147 So. 3d at 446

Even though 10 years have past since the State high court decided *Bottoson* and *King* and the makeup of the court has changed, a majority still adheres to its rejection of *Ring*'s applicability to Florida. This case presents this Court with the opportunity to examine Florida's death penalty procedures to determine if they pass constitutional muster under *Ring v. Arizona*. It should do so, in part, because the Florida Supreme Court has explicitly stated that it will not undertake such an analysis because it lacks the power to overrule this Court's previous decisions upholding the constitutionality of Florida's death penalty statutes. *See*, *Bottoson*, at 697. Instead, if any corrections or changes to the way this State imposes death sentences are to be made, it has said that they must come from this Court. Indeed, Justice Pariente, in her dissenting opinion in this case, and joined by two other members of that court, specifically noted that if Florida's death penalty statute needed correction, it had to come from this Court:

> Indeed, I continue to believe that, in light of *Ring*, Florida's death penalty statute, as applied in circumstances like those presented in this case where there is no unanimous jury finding as to any of the aggravating circumstances, is unconstitutional. *See Peterson*, 94 So.3d at 538 (Pariente, J., concurring as to conviction and dissenting as to sentence).

Hurst, 147 So. 3d at 449-50.

2. Non unanimous death recommendations do not violate *Ring*. Additionally, unique among other death penalty states and the sentencing schemes of the other hybrid statutes except Alabama,[7] Florida does not require a unanimous jury vote to recommend death. Section 921.141(3), Florida Statutes. Nor does it require a unanimous vote on the aggravating factors it uses to support its death recommendation Under *Ring*, a death sentence based on such jury votes is unconstitutional.

Ring, with its express respect for the Sixth Amendment's fundamental right of the voice of the community to be heard in a capital case, presents a strong argument that when a person's life is at stake a vote of death should be unanimous. The approval of a non-unanimous jury vote in death sentencing in light of Ring has troubled members of the Florida court. Justice Pariente, in concurring opinions and her dissenting opinion in this case has noted the constitutional problems of a lack of a unanimous jury vote in light of *Ring*. *See Anderson v. State*, 841 So.2d 390 (Fla. 2003)(Pariente, J. Concurring as to conviction and concurring in result only as to sentence); *Butler v. State*, 842 So. 2d 817 (Fla. 2003) (Pariente, concurring and dissenting).; *Bottoson v. Moore*, 833 So. 2d 693, 709 (Fla. 2002)(Anstead, dissenting).

The Florida Supreme Court remains deeply split on the applicability of *Ring* to Florida and continues to grapple with the problems of attempting to reconcile Florida's death penalty statutes with the constitutional requirements of *Ring*. *See, e.g., Marshall v. Crosby*, 911 So.2d 1129, 1133-

---

[7] Alabama, like Florida, allows juries to return a non-unanimous death recommendation, but at least 10 of the jurors must agree that is the appropriate punishment. Section 13A546(f), Ala. Crim. Code. Florida requires only a bare majority vote for death. Section 921.141(3), Florida Statutes (2002). Since Ring, the Delaware legislature passed, and its Governor has signed, legislation requiring unanimous death recommendations. 73 Del. Laws 423 (2002).

1135 (Fla. 2005)(including footnotes 4 & 5, and cases cited therein); *State v. Steele*, 921 So.2d 538 (Fla. 2005). However, a majority of the Florida Supreme Court has grown increasingly confident that *Ring* has no relevance to Florida's capital case process, and the court in *every* instance in which it has faced Ring issues, rejected them, usually summarily. Some members of the Florida court view this Court's denial of certiorari in *Bottoson*'s case as a tacit admission that *Ring* has no applicability to Florida's death sentencing scheme *Bottoson*, cited above. (Wells concurring.)

Almost as often as the court has denied relief under *Ring*, other members of the court have voiced their continuing concerns about the problems *Ring* poses to this state's administration of its death penalty scheme. *E.g.*, *Jones v. State*, 845 So. 2d 55, 77 (Fla. 2003)(Anstead, specially concurring); *Doorbal v. State*, 837 So. 2d 940 (Fla. 2003)(Anstead, Pariente, Shaw, concurring in result only). Moreover, the majority's steadfast refusal to look at Florida's death penalty statute in light of *Ring* is a problem it said this Court created, and only this Court can resolve. *Rodriquez de Quijas v. Shearson/ American Express*, 490 U.S. 477, 484 (1989); *Bottoson*, at 695 (footnote omitted.).[8]

The Florida Supreme Court has "invited" this Court to determine if *Ring* applies to the Florida's death penalty law, and until this Court accepts this invitation, a majority of the Florida court will refuse to consider *Ring* as anything more than a irrelevant oddity to the way it administers Florida's death penalty.[9] *U.S. v. Hatter*, 532 U.S. 557, 567 (2001).

---

[8] Of course, the Florida Supreme Court could very well have addressed the Ring issues because that case qualifies as an "intervening development in the law" that allows the state court to consider that case's impact on Florida's administration of its death penalty statute. See, Hubbard v. United States, 514 U.S. 695 (1995).

[9] As part of the distinct minority, Justice Anstead views Ring as "as the most significant death penalty decision from the United States Supreme Court in the past thirty years," and he believes

The State high court has, to its credit, recognized that its allowing nonunanimous death recommendations has constitutional problems. To cure that problem, it has, rather than itself finding unanimity required, asked the Florida legislature to address the problem. *State v. Steele*, 921 So.2d 538, 548 -550 (Fla. 2005). It has, however, not done so.

Hence, if *Ring* has any relevance to Florida's death penalty scheme, only this Court can so hold. Neither the Florida Supreme Court nor the Florida legislature has shown any interest or willingness to find that it does.

Indeed, the 11th Circuit Court of Appeals has similarly held that if Florida's death penalty scheme has any *Ring* problems only this Court can correct it. *Evans v. Secretary, Fla. Dep't of Corrections*, 699 F. 3d 1249 (11th Cir. 2012). As the Florida Supreme Court observed in this case:

> We also note that the Eleventh Circuit Court of Appeals in *Evans v. Secretary, Fla. Dep't of Corrections*, 699 F.3d 1249 (11th Cir.2012), *cert. denied*, *Evans v. Crews*, — U.S. —, 133 S.Ct. 2393, 185 L.Ed.2d 1105 (2013), reversed a federal district court's ruling that Florida's sentencing scheme violates *Ring*. The Eleventh Circuit noted that the United States Supreme Court's "last word in a Florida capital case on the constitutionality of that state's death sentencing procedures" came in *Hildwin v. Florida*, 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989), which predated *Ring*. *Evans*, 699 F.3d at 1258. This Court, in *Hildwin v. State*, rejected the claim that the sentencing scheme was unconstitutional because the jury is not required to make specific findings authorizing the imposition of the death penalty. 531 So.2d 124, 129 (Fla.1988). On review, the United States Supreme Court affirmed our decision in *Hildwin* and stated, "[T]he Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." *Hildwin*, 490 U.S. at 640–41, 109 S.Ct. 2055. As the Eleventh Circuit noted in *Evans*, the United States Supreme Court has never expressly overruled *Hildwin*, and did not do so in *Ring*. The *Evans* court also agreed with the State that Florida's sentencing procedures do provide for jury input about the

---

the court "honor bound to apply Ring's interpretation of the requirements of the Sixth Amendment to Florida's death penalty scheme." Duest (Anstead, concurring and dissenting); Bottoson, cited above, at page 703 (Anstead dissenting. Ring invalidates the "death penalty schemes of virtually all states.")

> existence of aggravating factors prior to sentencing—a process that was completely lacking in the Arizona statute struck down in *Ring*. *Evans*, 699 F.3d at 1261.

Hurst, 147 So. 3d at 446-47.

C. Non unanimous findings of aggravators.

Justice Pariente and two other members of the court in this case, concurred with the majority's approval of a death sentence in particular cases, but found fault with its willingness to allow non unanimous death recommendations. She has done so because, except for this and a few other cases, defendants usually had prior convictions for violent felonies, which can justify a death sentence §921.141(5)(b) Florida Statutes, and significantly lifted imposition sentence beyond any *Ring* problems. When, as in this case, however, the defendant has no prior felony conviction *Ring's* requirement of a jury's findings of fact fully applies.

In this case, however, Hurst has no such conviction for a prior violent felony. Hence, this case has in its purest form the problem *Ring* could present to Florida: the judge found, as a matter of fact, aggravators to justify a death sentence, and we have no idea if the jury also found those aggravators. As Justice Pariente also pointed out, "Because a penalty-phase jury in Florida is not required to make specific factual findings as to the aggravating circumstances necessary to impose the death penalty pursuant to Florida's capital sentencing statute, it is actually possible that there was not even a majority of jurors who agreed that the same aggravator applied. *See Peterson v. State*, 94 So.3d 514, 540 (Fla.2012) (Pariente, J., concurring as to conviction and dissenting as to sentence)." This possibility hardly inspires confidence that Florida has any clue what the jury's vote meant in this case. The jury's vote gave no clear voice of the community that death was justified. Outside the context of specific facts of a particular case, the Florida Supreme Court has maintained its unwillingness to even consider correcting the mind numbing possibilities created when it allowed

nonunanimous verdicts and nonunanimous decisions on possible aggravators. That is, that court has the obligation to create a set of standard jury instructions for use in all criminal cases, including those in which a death sentence is possible. In 2009 a call was made to include in the instructions for use in the penalty phase of a capital case for the jury to make special findings as to the aggravators applicable, but the court refused to do so. In re Standard Jury Instructions in Criminal Cases-Report No. 2005-2, 22 So. 3d 17, 24-27 (Fla. 2009). Significantly, only Florida, among the 35 states that have the death penalty faces that problem. Only Florida allows nonunanimous juries to recommend a death sentence when there is no evidence or verdict that they were not unanimous as to the vote for death and nonunanimous as to which aggravating factors support that nonunanimous decision. By far, most of the states that have a death penalty require juries to unanimously vote for that punishment. More specifically, of the thirty-five death penalty states only Florida permits imposition of a death sentence without a unanimous jury concluding that either 1. at least one specified aggravator is present or 2. that a death sentence is warranted. Twenty-seven of these states require both findings. Florida requires neither. *State v. Steele*, 921 So. 2d 538, 548-49 (Fla. 2005) (discussing state statutes).

Hence, this case presents a unique problem in death penalty jurisprudence that the Florida Supreme Court denies exists, and if it does, it expects this Court to correct. Until it does, this State will persist in denying *Ring* and all it means has any relevance to Florida's death penalty jurisprudence. We can expect that just like it has done for the last 10 years, it will continue to ignore *Ring*

This case presents the best, cleanest opportunity for it to do so. The jury recommended death by the narrowest of votes, 7-5, and the judge found three aggravators that only the jury in this case

could have found, but we have no evidence they did. Hurst has no prior conviction for a violent felony that could have rendered the trial court's *Ring* error in finding the aggravators harmless. Neither the Florida Supreme Court nor the Florida legislature have shown any interest or willingness to reverse the course the state high court has followed since this Court's decision in *Ring*. There is every indication that it will continue to do so. As Florida has one of the largest death row populations in the United States, it is reasonable to believe this issue will not only linger in cases already decided by this Court but will continue to recur in a significant number of future cases. Even if *Ring* is not retroactively applied to those. *Schriro v. Summerlin*, 542 U.S. 348, 124 S.Ct. 2519 (2004) this Court should accept jurisdiction in this case now and resolve this issue so that the significant number of Florida defendants facing a possible death sentence in the future will have a constitutionally imposed sentence.

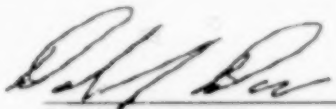
4. The jury has no role in determining whether the defendant is mentally retarded and hence ineligible for a sentence of death.

As noted above in Issue I, the Florida Supreme Court has clearly and without any ambiguity held that capital sentencing juries have no role in determining if a defendant is mentally retarded. That factual determination is clearly within their purview, and should be resolved by it. That the Supreme Court says it is not, is as clearly a violation of this Court's holding and rationale in *Ring*. "The fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives—whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—must be found by a jury." *Ring v. Arizona*, 536 U.S. at 610 (Scalia, J., concurring).

5. The Eighth Amendment implications. Finally, this case and Florida's position on nonunanimous verdicts and findings of aggravators also presents a clear violation of the Eighth Amendment. Its analysis focuses on the "evolving standards of decency that mark the progress of a civilized society." *Trop v. Dulles*, 356 U.S. 86, 100–101, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958) (plurality opinion). In the death penalty arena, while a clear majority of states have approved a spectrum of death penalty schemes, Florida remains unique among them in not requiring unanimity of either the finding or recommendation of death or of the aggravating factors that justified that verdict. It is a position the Florida Supreme Court has recognized, and it is one that court feels ill at ease about. To "resolve" it, it has asked the Florida Legislature to require unanimity. *Steele*, cited above at 550. It has refused to do so, and that failure violates the nation's "evolving standards of decency that mark the progress of a maturing society." Trop, cited above; *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183 (2005). This Court should accept jurisdiction in this case to do what the Florida Supreme Court refuses to do: apply the holding of *Ring* to Florida's death sentencing scheme, require unanimity of not only the death recommendation but the aggravators justifying that verdict, require Florida juries to pass on the issue of the defendant's mental retardation, and hold that it violates the Eighth Amendment's evolving standards of decency.

CONCLUSION

Hurst respectfully asks this honorable Court to accept jurisdiction in this case and issue a Writ of Certioruri to the Supreme Court of Florida.



DAVID A. DAVIS
Assistant Public Defender
Fla. Bar No. 0271543
Leon County Courthouse
301 South Monroe St., Suite 401
Tallahassee, FL 32301
(850) 606-8500
david.davis@flpd2.com

INDEX TO APPENDIX

A. Copy of the Florida Supreme Court's opinion, Hurst v. State, 147 So. 3d 435 (Fla. 2014).

B. Copy of Florida Supreme Court's order denying rehearing dated September 27, 2014.

APPENDIX A

147 So.3d 435, 39 Fla. L. Weekly S293
(Cite as: 147 So.3d 435)

H

Supreme Court of Florida.
Timothy Lee HURST, Appellant,
v.
STATE of Florida, Appellee.

No. SC12–1947.
May 1, 2014.
Rehearing Denied Sept. 4, 2014.

Background: After his first-degree murder conviction and death sentence were affirmed on direct appeal, defendant moved for postconviction relief. The Circuit Court, Escambia County, Linda Lee Nobles, J., denied motion. The District Court of Appeal affirmed conviction but remanded for new sentencing hearing, finding that defense counsel's failure to present expert mental mitigation at penalty phase constituted ineffective assistance. On remand, the District Court again sentenced defendant to death upon jury's recommendation of death by a seven to five vote. Defendant appealed.

Holdings: The Supreme Court held that:
(1) trial court was not required to conduct a second *Atkins* hearing on remand;
(2) any error in denying defendant a second *Atkins* hearing was harmless;
(3) trial court was not required to submit to jury the question of mental retardation;
(4) jury was not required under *Ring* to make specific findings authorizing the imposition of the death penalty; and
(5) death penalty was proportionate.

Affirmed.

Pariente, J., concurred in part and dissented in part and issued opinion in which Labarga and Perry, JJ., concurred.

West Headnotes

[1] Sentencing and Punishment 350H ⇐1642

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(B) Persons Eligible
350Hk1642 k. Mentally retarded persons. Most Cited Cases

Execution of mentally retarded defendants violates prohibition against cruel and unusual punishment. U.S.C.A. Const.Amend. 8.

[2] Sentencing and Punishment 350H ⇐1791

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)5 Mental Illness or Disorder
350Hk1791 k. In general. Most Cited Cases

States determine the manner of enforcement with respect to *Atkins's* prohibition against execution of mentally retarded individuals. U.S.C.A. Const.Amend. 8.

[3] Sentencing and Punishment 350H ⇐1642

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(B) Persons Eligible
350Hk1642 k. Mentally retarded persons. Most Cited Cases

© 2014 Thomson Reuters. No Claim to Orig. US Gov. Works.

In order to prove mental retardation as a bar to execution, the defendant must prove all three of the following factors: (1) significantly subaverage general intellectual functioning, which is interpreted to be a full scale IQ of 70 or below on a standardized intelligence test; (2) concurrent deficits in adaptive behavior; and (3) manifestation of the condition before age 18. U.S.C.A. Const.Amend. 8; West's F.S.A. § 921.137(1).

[4] Sentencing and Punishment 350H ⇨1793

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)5 Mental Illness or Disorder
350Hk1793 k. Evidence. Most Cited Cases

The burden is on the defendant raising a claim of mental retardation as a bar to execution to prove mental retardation by clear and convincing evidence. U.S.C.A. Const.Amend. 8; West's F.S.A. § 921.137(4).

[5] Sentencing and Punishment 350H ⇨1794

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)5 Mental Illness or Disorder
350Hk1794 k. Hearing. Most Cited Cases

Trial court was not required to conduct a second *Atkins* hearing to determine whether murder defendant was mentally retarded and thus ineligible for death penalty, on remand for new sentencing hearing; the issue had been fully litigated and defendant was able to present all evidence relating to the issue during the penalty phase. U.S.C.A. Const.Amend. 8; West's F.S.A. § 921.137(1).

[6] Sentencing and Punishment 350H ⇨1789(9)

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)4 Determination and Disposition
350Hk1789 Review of Proceedings to Impose Death Sentence
350Hk1789(9) k. Harmless and reversible error. Most Cited Cases

Any error in denying murder defendant a second pretrial *Atkins* hearing to determine whether he was mentally retarded and thus ineligible for the death penalty, on remand for new sentencing hearing, was harmless, as defendant was allowed to present all his mental retardation evidence at the penalty phase, after which trial court ruled that he failed to establish that he was mentally retarded. U.S.C.A. Const.Amend. 8; West's F.S.A. § 921.137(1).

[7] Sentencing and Punishment 350H ⇨1794

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)5 Mental Illness or Disorder
350Hk1794 k. Hearing. Most Cited Cases

Trial court was not required to submit to jury the question of mental retardation as a bar to imposition of death penalty for defendant's first-degree murder conviction. U.S.C.A. Const.Amend. 8; West's F.S.A. § 921.137(1).

[8] Sentencing and Punishment 350H ⇨1794

© 2014 Thomson Reuters. No Claim to Orig. US Gov. Works.

147 So.3d 435, 39 Fla. L. Weekly S293
(Cite as: 147 So.3d 435)

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)5 Mental Illness or Disorder
350Hk1794 k. Hearing. Most Cited Cases

A capital defendant has no right under *Atkins* to a jury determination of whether he is mentally retarded.

[9] Jury 230 ⚖34(9)

230 Jury
230II Right to Trial by Jury
230k30 Denial or Infringement of Right
230k34 Restriction or Invasion of Functions of Jury
230k34(5) Sentencing Matters
230k34(9) k. Death penalty. Most Cited Cases

Jury was not required, under *Ring*, to make specific findings authorizing the imposition of the death penalty for first-degree murder conviction; jury trial rights during sentencing under *Ring* did not encompass a right to specific jury findings authorizing the imposition of the sentence of death. U.S.C.A. Const.Amend. 6.

[10] Sentencing and Punishment 350H ⚖1681

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(D) Factors Related to Offense
350Hk1681 k. Killing while committing other offense or in course of criminal conduct. Most Cited Cases

Sentencing and Punishment 350H ⚖1684

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(D) Factors Related to Offense
350Hk1684 k. Vileness, heinousness, or atrocity. Most Cited Cases

Death sentence, when compared to death sentences in other comparable capital cases, was proportionate; victim was stabbed, suffering multiple sharp force injuries, and was beaten, the murder was especially heinous, atrocious or cruel, which aggravator was assigned great weight, and murder was committed while defendant was engaged in commission of a robbery, which was also assigned great weight. West's F.S.A. § 921.141(5)(d, h).

[11] Sentencing and Punishment 350H ⚖1652

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(C) Factors Affecting Imposition in General
350Hk1652 k. Aggravating circumstances in general. Most Cited Cases

Sentencing and Punishment 350H ⚖1653

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(C) Factors Affecting Imposition in General
350Hk1653 k. Mitigating circumstances in general. Most Cited Cases

Sentencing and Punishment 350H ⚖1788(5)

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)4 Determination and Disposition
350Hk1788 Review of Death Sentence
350Hk1788(5) k. Scope of review.

© 2014 Thomson Reuters. No Claim to Orig. US Gov. Works.

147 So.3d 435, 39 Fla. L. Weekly S293
(Cite as: 147 So.3d 435)

Most Cited Cases

The death penalty must be reserved only for those cases where the most aggravating and least mitigating circumstances exist and the Supreme Court will not disturb the sentencing judge's determination as to the relative weight to give to each established mitigator where that ruling is supported by competent, substantial evidence in the record.

[12] Sentencing and Punishment 350H ⚿1788(8)

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)4 Determination and Disposition
350Hk1788 Review of Death Sentence
350Hk1788(8) k. Discretion of lower court. Most Cited Cases

The Supreme Court reviews the weight the capital sentencing court ascribes to mitigating factors under the abuse of discretion standard.

[13] Sentencing and Punishment 350H ⚿1788(5)

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)4 Determination and Disposition
350Hk1788 Review of Death Sentence
350Hk1788(5) k. Scope of review. Most Cited Cases

The Supreme Court will affirm the weight given an aggravator for capital sentencing purposes if based on competent substantial evidence.

[14] Sentencing and Punishment 350H ⚿1788(8)

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)4 Determination and Disposition
350Hk1788 Review of Death Sentence
350Hk1788(8) k. Discretion of lower court. Most Cited Cases

The weight to be given aggravating factors is within the discretion of the capital sentencing court, and it is subject to the abuse of discretion standard.

*436 Nancy Ann Daniels, Public Defender, and David A. Davis and William Carl McLain, Assistant Public Defenders, Tallahassee, FL, for Appellant.

Pamela Jo Bondi, Attorney General, and Stephen Richard White, Assistant Attorney General, Tallahassee, FL, for Appellee.

*437 PER CURIAM.

Timothy Lee Hurst appeals his sentence of death that was imposed for the 1998 first-degree murder of Cynthia Harrison. We have jurisdiction. *See* art. V, § 3(b)(1), Fla. Const. For the reasons set forth below, we affirm his sentence.

FACTS AND PROCEDURAL HISTORY

Hurst was convicted for the May 2, 1998, first-degree murder of Cynthia Harrison in a robbery at the Popeye's restaurant where Hurst was employed in Escambia County, Florida. The victim, also an employee, had been bound and gagged and repeatedly cut and stabbed with a weapon consistent with a box cutter found at the scene. Hurst's conviction and death sentence were originally affirmed in *Hurst v. State*, 819 So.2d 689 (Fla.2002). In that decision, we set forth the facts surrounding the murder as follows:

© 2014 Thomson Reuters. No Claim to Orig. US Gov. Works.

147 So.3d 435, 39 Fla. L. Weekly S293
(Cite as: 147 So.3d 435)

On the morning of May 2, 1998, a murder and robbery occurred at a Popeye's Fried Chicken restaurant in Escambia County, Florida, where Hurst was employed. Hurst and the victim, assistant manager Cynthia Lee Harrison, were scheduled to work at 8 a.m. on the day of the murder. A worker at a nearby restaurant, Carl Hess, testified that he saw Harrison arriving at work between 7 a.m. and 8:30 a.m. Afterwards, Hess said that he saw a man, who was about six feet tall and weighed between 280 and 300 pounds, arrive at Popeye's and bang on the glass windows until he was let inside. The man was dressed in a Popeye's uniform and Hess recognized him as someone he had seen working at Popeye's. Shortly after the crime, Hess picked Hurst from a photographic lineup as the man he had seen banging on the windows. Hess was also able to identify Hurst at trial.

On the morning of the murder, a Popeye's delivery truck was making the rounds at Popeye's restaurants in the area. Janet Pugh, who worked at another Popeye's, testified she telephoned Harrison at 7:55 a.m. to tell her that the delivery truck had just left and Harrison should expect the truck soon. Pugh spoke to the victim for four to five minutes and did not detect that there was anything wrong or hear anyone in the background. Pugh was certain of the time because she looked at the clock while on the phone.

Popeye's was scheduled to open at 10:30 a.m. but Harrison and Hurst were the only employees scheduled to work at 8 a.m. However, at some point before opening, two other Popeye's employees arrived, in addition to the driver of the supply truck. None of them saw Hurst or his car. At 10:30 a.m., another Popeye's assistant manager, Tonya Crenshaw, arrived and found the two Popeye's employees and the truck driver waiting outside the locked restaurant.

When Crenshaw unlocked the door, and she and the delivery driver entered, they discovered that the safe was unlocked and open, and the previous day's receipts, as well as $375 in small bills and change, were missing. The driver discovered the victim's dead body inside the freezer. The victim had her hands bound behind her back with black electrical tape and she also had tape over her mouth. Similar tape was later found in the trunk of Hurst's car. The scene was covered with a significant amount of the victim's blood, and it was apparent from water on the floor that someone had attempted to clean up the area.

The victim suffered a minimum of sixty incised slash and stab wounds, including severe wounds to the face, neck, *438 back, torso, and arms. The victim also had blood stains on the knees of her pants, indicating that she had been kneeling in her blood. A forensic pathologist, Dr. Michael Berkland, testified that some of the wounds cut through the tissue into the underlying bone, and while several wounds had the potential to be fatal, the victim probably would not have survived more than fifteen minutes after the wounds were inflicted. Dr. Berkland also testified that the victim's wounds were consistent with the use of a box cutter. A box cutter was found on a baker's rack close to the victim's body. Later testing showed that the box cutter had the victim's blood on it. It was not the type of box cutter that was used at Popeye's, but was similar to a box cutter that Hurst had been seen with several days before the crime.

Hurst's friend, Michael Williams, testified that Hurst admitted to him that he had killed Harrison. Hurst told him that he had an argument with the victim, she "retaliated," and that Hurst hit the victim and cut her with a box cutter. Hurst said he had killed the victim because, "he didn't want the woman to see his face." Williams stated that Hurst had talked about robbing Popeye's on previous oc-

© 2014 Thomson Reuters. No Claim to Orig. US Gov. Works.

casions.

Another of Hurst's friends, "Lee–Lee" Smith, testified that the night before the murder, Hurst said he was going to rob Popeye's. On the morning of the murder, Hurst came to Smith's house with a plastic container full of money from the Popeye's safe. Hurst instructed Smith to keep the money for him. Hurst said he had killed the victim and put her in the freezer. Smith washed Hurst's pants, which had blood on them, and threw away Hurst's socks and shoes. Later that morning, Smith and Hurst went to Wal–Mart to purchase a new pair of shoes. They also went to a pawn shop where Hurst saw some rings he liked, and after returning to Smith's house for the stolen money, Hurst returned to the shop and purchased the three rings for $300. An employee at the shop, Bob Little, testified that on the day of the murder, a man fitting Hurst's description purchased three rings. Little picked Hurst out of a photographic lineup as the man who had purchased the rings. The police recovered the three rings from Hurst.

Smith's parents were out of town the weekend of the murder but upon their return, and after discovering the container with the money from Popeye's in Smith's room, Smith's mother contacted the police and turned the container over to them. The police interviewed Smith and searched a garbage can in Smith's yard where they found a coin purse that contained the victim's driver's license and other property, a bank bag marked with "Popeye's" and the victim's name, a bank deposit slip, a sock with blood stains on it, and a sheet of notebook paper marked "Lee Smith, language lab." On the back of the notebook paper someone had added several numbers, and one number was the same as the amount on the deposit slip. Smith's father also gave the police a pair of size fourteen shoes that appeared to have blood stains on them and that he had retrieved from the same trash can.

Jack Remus, a Florida Department of Law Enforcement (FDLE) crime lab analyst, testified that the shoes were tested with phenolpthalein to detect blood, and while the test results exhibited some of the chemical indications associated with blood, attempts at DNA testing were not successful. Remus also tested the blood-stained sock and determined that the DNA typing was consistent *439 with the victim. Hurst's pants were also tested, but no blood evidence was detected. FDLE fingerprint expert Paul Norkus testified that the deposit slip in the garbage can had three of Hurst's fingerprints on it.

At trial, the State played the tape of an interview the police had conducted with Hurst shortly after the murder. Hurst said that on the morning of the murder he was on his way to work and his car broke down. He said that he telephoned Harrison at Popeye's to say he was unable to come to work, and when he talked to her, she sounded scared and he heard whispering in the background. Hurst then went to Smith's house and changed out of his work clothes. Hurst said he went to the pawn shop and bought necklaces for friends, but he did not mention purchasing the three rings or buying a new pair of shoes at Wal–Mart.

At the close of the guilt phase of the trial, the jury deliberated for approximately six hours before finding Hurst guilty of first-degree murder.

Hurst, 819 So.2d at 692–94 (footnotes omitted).

Hurst filed his initial, amended postconviction proceeding in circuit court. [FN1] On appeal from denial of postconviction relief, we affirmed on all but one of his postconviction claims. *See Hurst v. State*, 18 So.3d 975 (Fla.2009). Although we concluded that the State should have disclosed certain field notes by investigator Donald Nesmith, and that the trial court's refusal *440 to perpetuate the testimony of Willie Griffin was an abuse of discretion, we concluded no prejudice

© 2014 Thomson Reuters. No Claim to Orig. US Gov. Works.

147 So.3d 435, 39 Fla. L. Weekly S293
(Cite as: 147 So.3d 435)

accrued from those errors. *Id.* at 1015. However, we reversed the denial of relief on Hurst's claim of ineffective assistance of counsel in investigation and presentation of mitigation in the penalty phase, and remanded for a new penalty phase proceeding. *Id.* at 1008. In granting a new penalty phase, we explained that there was no sound basis for Hurst's defense counsel to have failed to investigate and present evidence of Hurst's borderline intelligence, possible organic brain damage, the fact that he was in special education classes as a child, and other mitigation for which there appeared to be no apparent disadvantage in presentation. *See id.* at 1013–15.

FN1. The claims raised in the initial postconviction motion were: (1) the State withheld material and exculpatory evidence and/or presented misleading and false testimony, i.e., false testimony of inmate witness Anthony Williams that defendant confessed, in exchange for promises of leniency for Williams; suppression of testimony of David Kladitis that three or four black males were in the Popeye's parking lot at 7:00 a.m.; false testimony and argument about defendant failing to mention his trip to Wal–Mart; withholding the fact that the State planned to indict witness Lee ("Lee–Lee") Smith; and cumulative effect of these errors; (2) newly discovered evidence concerning Anthony Williams that his testimony of Hurst's confession was fabricated, newly discovered evidence that jail witness Willie Griffin (Anthony's cousin) testified falsely against defendant, and newly discovered evidence from inmate Edison Sartes that Griffin's testimony was false; new information that primary witness Lee–Lee Smith was going to be and was charged in the case, when at the time of trial he had not been charged; false testimony of witness Carl Hess, who identified defendant based on a false claim of a prior job interview of defendant; and inappropriate conversation at trial between Hess and Kladitis; (3) defense counsel was ineffective in that he failed to adequately investigate and/or present exculpatory and impeachment evidence of potential witness Andrew Salter who was at the crime scene and who would have said he did not see defendant or his car there; failing to secure the testimony of inmate Brett Pleasant regarding his conversations with witness Anthony Williams; failing to object to inadmissible testimony and evidence of defendant's lack of remorse; failing to move for mistrial after an emotional display by the victim's family; failing to object or move for mistrial concerning evidence of physical abnormality of the victim given to create sympathy; and cumulative effect of these errors; (4) counsel failed to adequately investigate and present mitigation in the penalty phase about defendant's childhood, lack of parental support, poverty, physical and mental abuse, drug and alcohol abuse; and counsel's failure to seek a psychiatric evaluation and to present mental mitigation including evidence of neurological and mental deficits and brain damage; (5) defendant may not be executed because he is mentally retarded under *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002); (6) Florida's capital sentencing statute violates the Eighth and Fourteenth Amendments to the United States Constitution and *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002); (7) cumulative error unconstitutionally deprived defendant of a fair trial, requiring a new trial. Not all the claims raised in the postconviction motions were appealed.

Prior to the new sentencing trial, the trial court denied Hurst's successive motion for an evidentiary hearing on mental retardation.[FN2] In addition, the court denied Hurst's request to present mental retardation to

© 2014 Thomson Reuters. No Claim to Orig. US Gov. Works.

the penalty phase jury as an absolute bar to recommendation of a death sentence, although the court allowed him to present mental retardation and other mental issues as mitigation to the jury. After the new penalty phase evidence was presented, in which the State presented an abbreviated version of the trial testimony as to the circumstances of the murder, and after the defense presented testimony concerning mitigation, the jury returned a recommendation of death by a seven-to-five vote.

> FN2. The 2013 Legislature amended all Florida statutes that refer to "mental retardation," "retardation," and "mentally retarded" to now refer to "intellectual disability" or "intellectually disabled." *See* ch.2013–162, Laws of Fla.; *see, e.g.*, section 921.137, Florida Statutes (2013), titled "Imposition of the death sentence upon an intellectually disabled defendant prohibited." Because the prior statute was in effect when Hurst raised the issue in the trial court, we continue to use the terms "mental retardation" and "mentally retarded" in this opinion.

Before sentencing, the trial court held a *Spencer*[FN3] hearing at which defense counsel presented further argument that the evidence at the penalty phase established that Hurst was mentally retarded. The trial court subsequently entered a sentencing order sentencing Hurst to death. In doing so, the court found as aggravating factors that (1) the murder was especially heinous, atrocious or cruel, *see* § 921.141(5)(h), Fla. Stat. (2012), which was assigned great weight; and (2) the murder was committed while Hurst was engaged in commission of a robbery, *see* § 921.141(5)(d), Fla. Stat. (2012), which was assigned great weight. In mitigation, the trial court found the following two statutory mitigators: (1) no significant history of prior criminal activity, *see* § 921.141(6)(a), Fla. Stat. (2012), which was assigned moderate weight; and (2) Hurst's age of 19 and his young mental age, *see* § 921.141(6)(g), Fla. Stat. (2012), which was assigned moderate weight. The trial court found as additional mitigation under section 921.141(6)(h), Florida Statutes (2012), that Hurst had significant mental issues—limited mental and intellectual capacity with widespread abnormalities in his brain affecting impulse control and judgment consistent with fetal alcohol syndrome, which was assigned moderate weight—although the court expressly found that Hurst is not mentally retarded. The trial court rejected as unproven proffered mitigating factors that the defendant was under the influence of mental or emotional disturbance; the defendant was an accomplice with relatively minor participation; the defendant acted under extreme duress or substantial domination of another; or the defendant lacked the capacity*441 to appreciate the criminality of his conduct or conform his conduct to the requirements of law. *See* §§ 921.141(6)(b), (d), (e), & (f), Fla. Stat. (2012).

> FN3. *Spencer v. State*, 615 So.2d 688 (Fla.1993).

Hurst took a timely appeal from the sentence of death raising the following issues: (1) whether the trial court erred in refusing to give him a separate evidentiary hearing on his successive mental retardation claim, in refusing to allow the jury to determine mental retardation as a bar to execution, and in finding after trial that he is not mentally retarded and exempt from execution; (2) whether this Court should recede from precedent holding that the jury need not expressly find specific aggravators or issue a unanimous advisory verdict on the sentence; and (3) whether his death sentence is proportionate. We turn to Hurst's first issue on appeal.

ANALYSIS

A. Mental Retardation Issues

[1][2][3][4] The United States Supreme Court held in *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), that the Eighth Amendment to the United States Constitution forbids execution of mentally retarded defendants. However,

© 2014 Thomson Reuters. No Claim to Orig. US Gov. Works.

the Supreme Court left it to the states to determine the manner in which this constitutional restriction on execution of its sentences will be enforced. *Id.* at 317, 122 S.Ct. 2242. Florida law sets forth a three-pronged test to determine mental retardation as a bar to the death penalty. In order to prove mental retardation as a bar to execution, the defendant must prove all three of the following factors: (1) significantly subaverage general intellectual functioning, which has been interpreted to be a full scale IQ of 70 or below on a standardized intelligence test; (2) concurrent deficits in adaptive behavior; and (3) manifestation of the condition before age eighteen. *See, e.g., Nixon v. State*, 2 So.3d 137, 142 (Fla.2009); § 921.137(1), Fla. Stat. (2012). The burden is on the defendant raising a claim of mental retardation as a bar to execution to prove mental retardation by clear and convincing evidence. *See Nixon*, 2 So.3d at 145; § 921.137(4), Fla. Stat. (2012).

[5] Hurst contends that the trial court erred in denying a successive mental retardation hearing pursuant to Florida Rule of Criminal Procedure 3.203. He contends that he is mentally retarded and exempt from execution based on a recent Wechsler Adult Intelligence Scale, Fourth Edition (WAIS–IV) test that indicated his full scale IQ is 69, and based on expert testimony that he suffered from adaptive deficits—all before age eighteen—such that he met the statutory requirements for mental retardation. Hurst was previously provided a full evidentiary hearing on the question of mental retardation in his initial postconviction proceeding. At that evidentiary hearing, Hurst presented the expert testimony of Dr. Valerie McClain, a licensed clinical psychologist, who administered a number of tests to Hurst, including the Wechsler Abbreviated Scale of Intelligence (WASI). That test placed Hurst in the borderline range with a full scale IQ score of 70. As to deficits in adaptive functioning, Dr. McClain testified that in her opinion Hurst did not meet the adaptive functioning deficit threshold for mental retardation, and she did not determine that Hurst is mentally retarded. At that same evidentiary hearing, the State presented clinical psychologist Dr. James D. Larsen. After testing Hurst with the WAIS–III test, Dr. Larsen concluded that Hurst's full scale IQ was 78. Dr. Larsen also found no deficits in adaptive functioning necessary for a diagnosis of mental retardation. The circuit court in that initial postconviction proceeding denied the mental retardation claim, relying primarily on the testimony of Dr. *442 McClain and Dr. Larsen that Hurst's adaptive behavior was not substantially impaired; however, no appeal was taken of that ruling when it was denied in 2007. *See Hurst*, 18 So.3d at 1008 n. 9.

[6] In this case, Hurst contends that the trial court should have held a second *Atkins* mental retardation hearing prior to the new sentencing trial. The trial court denied the request for a pretrial evidentiary hearing on several grounds, one of which was that the motion was untimely under the requirements of rule 3.203. We conclude that denial of the request for a second *Atkins* hearing was not an abuse of discretion under the circumstances present in this case. *See, e.g., Arbelaez v. State*, 898 So.2d 25, 42–43 (Fla.2005) (reviewing a trial court's decision not to allow supplemental *Ring* and *Atkins* claims on remand under an abuse of discretion standard). Moreover, any error in denying the pretrial evidentiary hearing on mental retardation was harmless because Hurst was allowed to present all his mental retardation evidence at the penalty phase, after which the trial court ruled that he failed to establish that he is mentally retarded. The background and mental mitigation evidence presented by Hurst at the penalty phase is discussed next.

Hurt's sister, Sequester "Tina" Hurst; brother, Jermaine Bradley; mother, Bertha Bradley; father, Timothy Bradley; Bible study teacher, Isaac Sheppard; administrator at Hurst's high school, Calvin Harris; and former United States Army Major and principal of East Charter School, Jerome Chism, all testified concerning Hurst's family and background. Hurst's mother was age fifteen when Hurst was born and, during pregnancy, she drank all day, every day.

© 2014 Thomson Reuters. No Claim to Orig. US Gov. Works.

147 So.3d 435, 39 Fla..L. Weekly S293
(Cite as: 147 So.3d 435)

As a child, Hurst stuttered and developed very slowly. As a toddler, he was slow to learn to walk. He was disciplined harshly when he was growing up and was punished more than the other children because he could not do things correctly.

Hurst was a fun-loving child and teenager with a good personality. He liked to play jokes and was mild tempered, but was slow mentally and did very poorly in school. In Bible study classes as a child, Hurst was unable to progress out of the most basic children's Bible study book and could not look up the Bible verses that went with the stories. He was embarrassed because he had difficulty reading. Hurst should have been in special education classes because he was low functioning and could not understand what was going on in class; and for that reason, he would skip class and play basketball in the gym. Even though his school wanted to place Hurst in a special education program, his mother objected because she was afraid he would be picked on. He did go to East Charter School, which taught low achievers and children with behavioral problems, and while there, was teased about his large size and his slowness. His maturity level remained very low and even at age eighteen, he exhibited the maturity of a middle-school student. Hurst could not obtain a GED, but did have a driver's license and obtained a car with his father's help, although he was a poor driver.

Family members testified that Hurst had to be reminded to take care of himself; and he allowed his mother and sister to wash his clothes, and allowed his mother to cook for him. He had poor hygiene and had to be reminded to bathe and dress appropriately. He had to be reminded to keep appointments and be awakened for work. Hurst did not have a checking account and would likely have had difficulty making change if he was working a cash register. However, Hurst was employed at Popeye's and did food "prep work."

*443 Dr. Joseph Wu, a psychiatrist, professor of psychiatry, and clinical director of the University of California at Irvine College of Medicine Brain Imaging Center, testified as an expert on the use of positron emission tomography (PET) in regard to neurological and psychiatric disorders. He was present when a PET scan was performed on Hurst and later interpreted the results of that PET scan. Dr. Wu testified that the scan showed a decreased cortical cerebellum metabolic rate, which indicated widespread damage to the cortical region of Hurst's brain. He opined that Hurst has widespread abnormalities in multiple areas of his brain, which abnormalities are associated with lack of judgment, risk taking, impulsivity, and immaturity. Dr. Wu was aware that it was reported Hurst suffered from fetal alcohol syndrome, which, along with other trauma, can cause the types of problems seen in Hurst's PET scan, although he could not say from the PET scan what caused the abnormalities in Hurst's brain.

Dr. Harry Krop, a clinical and forensic psychologist, testified that he administered the WAIS–IV test, as well as a test of memory malingering (TOMM), to Hurst in January and February 2012. The testing resulted in a full scale IQ of 69, which is in the range of mental retardation. Dr. Krop reviewed details of the murder, Hurst's regular school records, the charter school records, Florida Department of Corrections records, tests and reports of other testing performed on Hurst, and Dr. Wu's PET scan report. He also spoke to various family members for the purpose of evaluating Hurst's adaptive functioning as measured by completion of the Adaptive Behavior Assessment System (ABAS). He did not listen to the recorded statement Hurst gave to police. After reviewing the questionnaire for the ABAS, which was completed by Hurst and three family members, Dr. Krop concluded that Hurst is significantly deficient in all areas of adaptive functioning. Dr. Krop was aware of earlier testing in which Hurst scored in the 78 IQ range on a different WAIS test, which Dr. Krop opined was not as accurate as the newer WAIS–IV, and his final opinion was that Hurst is mentally re-

© 2014 Thomson Reuters. No Claim to Orig. US Gov. Works.

147 So.3d 435, 39 Fla. L. Weekly S293
(Cite as: 147 So.3d 435)

tarded.

Dr. Gordon Taub, psychologist and associate professor at the University of Central Florida specializing in measurement of intelligence, structure of intelligence, intelligence theory, and evaluation of intelligence tests, testified that he has written articles about the Wechsler Scale of Intelligence tests. He testified that the WAIS–IV, which was revised in 2008, now measures four areas of intelligence, made changes in the subtests, and added some completely new tests. Dr. Taub was aware that Hurst received a full scale IQ score of 78 on the earlier WAIS–III test in 2004, which he said tested for only two main factors. He agreed that on the WAIS–IV test, which was given by Dr. Krop and which tests for four main factors, Hurst received a full scale score of 69. Dr. Taub opined that scores on the current WAIS–IV and earlier Wechsler tests cannot properly be compared because of the changes to the newer test and because the WAIS–IV is a much better test. However, Dr. Taub agreed that the WAIS–III is a "valid score of intelligence and there's no reason not to use that score if you attained it at the time that it was the test to use to measure intelligence."

Dr. Taub testified that other testing done on Hurst when he was under the age of eighteen and still in school showed depressed scores. As to Hurst's adaptive functioning, Dr. Taub testified that the information gathered by Dr. Krop showed Hurst was impaired in functioning in the real world in areas of self-care and in communication. Dr. Taub administered the Woodcock Johnson Test of Achievement,*444 Third Edition, to Hurst, which tests areas in reading, writing, math, and spelling. He opined that Hurst's limited proficiency shown on the achievement test is consistent with his school records showing low performance. He concluded based on the WAIS–IV test and on information concerning Hurst's adaptive functioning, school records, and achievement testing, that Hurst meets the legal criteria for mental retardation in Florida.

The State presented the testimony of Dr. Harry McClaren, forensic psychologist, who testified that he reviewed court documents, the testimony of Hurst's family members, the testimony of Drs. McClain and Larson at the prior evidentiary hearing, mental health records from the Department of Corrections, educational records and school test results, information about the crime, Hurst's statement to police, and the testimony of Drs. Taub and Krop. Dr. McClaren also reviewed a WAIS–III test given to Hurst by a Dr. Riebsame in 2003 and the WASI (Wechsler Abbreviated Scale of Intelligence) given by Dr. McClain in 2004. He testified that it would be a mistake to ignore Hurst's past testing with the WAIS–III resulting in full scale IQ scores of 76 and 78 because that test was the state of the art instrument at the time. Dr. McClaren also testified that there was no adaptive behavior testing done when Hurst was young, and now the reports of his deficits are anecdotal. He opined that Hurst does not meet the criteria for mental retardation.

The trial court relied primarily on the testimony of Dr. McClaren and on evidence of Hurst's actions in and around the time of the crime in determining that Hurst did not meet the test for mental retardation as a bar to the death penalty. In addition to testimony of members of law enforcement who investigated the crime and recovered evidence from Lee–Lee Smith's house, the State presented Hurst's statement given to detectives at the time. After Hurst signed a waiver of his rights and agreed he was speaking voluntarily with the detectives, he gave a narrative of what he said he did that morning in which he described going to a friend's house to unsuccessfully try to use the telephone because, he said, his car broke down. He gave street directions to that friend's house. Hurst said he then went to the E–Z Serve to use the pay telephone to call Popeye's and tell Cynthia Harrison he would not be able to come into work. He said that she spoke "in a scary voice" with a "scary tone," and he could hear some whispering in the background. He recited the telephone number that he called to talk with her. Hurst

© 2014 Thomson Reuters. No Claim to Orig. US Gov. Works.

also related to detectives that he went to Lee–Lee Smith's house that morning, and then to his own house where his brother Jermaine asked Hurst to take him to a pawn shop. Hurst described putting something in his car to clean out the gas tank and then driving to the pawn shop with Jermaine, Lee–Lee, and another young man. Hurst said in his statement that he bought his brother two necklaces at the pawn shop with his brother's money. Hurst told detectives that after leaving Lee–Lee Smith's house and before going to the pawn shop, he changed his shirt and shoes but not his work pants. Timothy Bradley, Hurst's biological father, testified that on the morning of May 2, 1998, at around 7:45 a.m., he saw Hurst putting the battery back into his car after the battery had been on the charger all night. At that time, Hurst was wearing his Popeye's uniform.

The trial court concluded in the sentencing order that Hurst was able to maintain a job and had acquired a driver's license. The court noted that Hurst's statement to police and his efforts to conceal his involvement in the crime were particularly *445 persuasive in determining that Hurst did not suffer significant deficits in adaptive functioning. The court stated, "The statement, given shortly after the crime, reveals an individual clearly recounting a morning's events, giving directions, recalling telephone numbers, and deliberately omitting certain information tending to incriminate him. Similarly, the evidence offered at trial suggests that Defendant took numerous steps to conceal his involvement in the crime by attempting to clean the murder scene, having his clothes washed, hiding the money in another location, discarding Ms. Harrison's belongings and his shoes, and buying new shoes." We also note that evidence that Hurst was a nineteen-year-old who still lived at home and allowed his mother and sister to cook for him and do his laundry does not establish that he is unable to care for himself. Because the trial court had before it competent, substantial evidence to support its conclusion that Hurst is not mentally retarded under the three-prong test set forth in Florida law, we find no error in this ruling.

[7][8] Although Hurst was allowed to present all his mental retardation and other mental mitigation to the jury, he also contends that the trial court erred in refusing to submit the question of mental retardation as a bar to the death penalty to the jury for its determination. This claim lacks merit. We have repeatedly held that a defendant has no right under *Atkins* to a jury determination of whether he is mentally retarded. *See Hodges v. State*, 55 So.3d 515, 526 (Fla.2010) (holding that defendant is not entitled to a jury determination of his mental retardation status), *cert. denied*, ––– U.S. ––––, 132 S.Ct. 164, 181 L.Ed.2d 77 (2011); *Kilgore v. State*, 55 So.3d 487, 510–11 (Fla.2010) (reiterating that the capital defendant has no right under *Atkins* to a jury determination whether he is mentally retarded); *Rodriguez v. State*, 919 So.2d 1252, 1267 (Fla.2005) (same). Some states have established procedures under which a jury does determine if a capital defendant is mentally retarded. *See, e.g., Commonwealth v. Sanchez*, 614 Pa. 1, 36 A.3d 24, 60–61 (2011) (discussing survey of state law on procedures for determining mental retardation in capital cases). Florida is not one of those states, and the United States Supreme Court has not mandated any specific procedure for making the determination of mental retardation in the capital sentencing context. Thus, the trial court did not err in refusing to submit to the jury the question of Hurst's mental retardation as a bar to the death penalty in this case.

B. Lack of Jury Findings as to Specific Aggravators and Lack of a Unanimous Advisory Verdict on the Sentence

[9] Hurst next contends that constitutional error occurred in his case because the advisory jury in the penalty phase was not required to find specific facts as to the aggravating factors,[7][8] and that the jury was not required to make a unanimous recommendation as to the sentence. In this case, the jury voted seven to five to recommend a death sentence be imposed. Hurst bases his claims on the United States Supreme Court's

© 2014 Thomson Reuters. No Claim to Orig. US Gov. Works.

decision in *Ring*, which held that capital defendants are entitled to a jury determination of any fact on which the legislature conditions an increase in the maximum punishment. 536 U.S. at 589, 122 S.Ct. 2428. Hurst recognizes that *446 our precedent has repeatedly held that *Ring* does not require the jury to make specific findings of the aggravators or to make a unanimous jury recommendation as to sentence, and he asks us to revisit our precedent on the issue in the decisions in *Bottoson v. Moore*, 833 So.2d 693 (Fla.2002), and *King v. Moore*, 831 So.2d 143 (Fla.2002). In the plurality decisions in both cases, we rejected claims that *Ring* applied to Florida's capital sentencing scheme. We decline to revisit those decisions in this case.

> FN4. Hurst's counsel asked for an interrogatory verdict to specify the aggravators found and the votes on each. The motion was denied.

Hurst contends that the facts of this case support a conclusion that *Ring* applies to require the jury to expressly find one or more aggravators and to issue its recommendation based on a unanimous advisory verdict. He contends that this case is distinguishable from cases where a jury has unanimously found an aggravating factor such as conviction of a prior violent felony or that the murder was committed in the course of committing, attempting to commit, or flight after commission of a separate enumerated felony. *See* § 921.141(5)(b), (d), Fla. Stat. (2012). There is no prior violent felony aggravator in this case, nor did this jury convict Hurst of a contemporaneous felony such as robbery. However, we have rejected the *Ring* claim in similarly situated cases.

We previously rejected the invitation to revisit our decisions in *Bottoson* and *King* in *Peterson v. State*, 94 So.3d 514 (Fla.), *cert. denied*, ––– U.S. ––––, 133 S.Ct. 793, 184 L.Ed.2d 586 (2012), a case which also did not involve conviction for a prior violent felony or a contemporaneous enumerated felony, and did not involve a unanimous jury advisory verdict. There, the majority stated, "We have consistently rejected claims that Florida's death penalty statute is unconstitutional." *Id.* at 538 (citing *Baker v. State*, 71 So.3d 802, 823–24 (Fla.2011), *cert. denied*, ––– U.S. ––––, 132 S.Ct. 1639, 182 L.Ed.2d 238 (2012); *Darling v. State*, 966 So.2d 366, 387 (Fla.2007); *Frances v. State*, 970 So.2d 806, 822 (Fla.2007)). Similarly, in *Butler v. State*, 842 So.2d 817, 834 (Fla.2003), this Court rejected the *Ring* claim where there was no aggravating factor based on a prior violent felony conviction and there was no unanimous jury advisory sentence. *See also Ault v. State*, 53 So.3d 175, 206 (Fla.2010) ("[T]his Court has repeatedly and continually rejected such claims" that the advisory verdict must be unanimous); *Coday v. State*, 946 So.2d 988, 1006 (Fla.2006) (reiterating that it is not unconstitutional for a jury to be allowed to recommend death by a simple majority vote). We continue to adhere to this same body of precedent.

We also note that the Eleventh Circuit Court of Appeals in *Evans v. Secretary, Fla. Dep't of Corrections*, 699 F.3d 1249 (11th Cir.2012), *cert. denied*, *Evans v. Crews*, ––– U.S. ––––, 133 S.Ct. 2393, 185 L.Ed.2d 1105 (2013), reversed a federal district court's ruling that Florida's sentencing scheme violates *Ring*. The Eleventh Circuit noted that the United States Supreme Court's "last word in a Florida capital case on the constitutionality of that state's death sentencing procedures" came in *Hildwin v. Florida*, 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989), which predated *Ring*. *Evans*, 699 F.3d at 1258. This Court, in *Hildwin v. State*, rejected the claim that the sentencing scheme was unconstitutional because the jury is not required to make specific findings authorizing the imposition of the death penalty. 531 So.2d 124, 129 (Fla.1988). On review, the United States Supreme Court affirmed our decision in *Hildwin* and stated, "[T]he Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." *Hildwin*, 490 U.S. at 640–41, 109 S.Ct. 2055. As the Eleventh

© 2014 Thomson Reuters. No Claim to Orig. US Gov. Works.

147 So.3d 435, 39 Fla. L. Weekly S293
(Cite as: 147 So.3d 435)

Circuit noted in *Evans*, the United States Supreme*447 Court has never expressly overruled *Hildwin*, and did not do so in *Ring*. The *Evans* court also agreed with the State that Florida's sentencing procedures do provide for jury input about the existence of aggravating factors prior to sentencing—a process that was completely lacking in the Arizona statute struck down in *Ring*. *Evans*, 699 F.3d at 1261. For all these reasons, we reject Hurst's claim that Florida's capital sentencing scheme is unconstitutional under *Ring*.

C. Proportionality

[10] Hurst next contends that the death sentence in this case is not proportional because it is not one of the most aggravated and least mitigated of first-degree murders, thus requiring that his death sentence be reduced to life in prison. He contends that a life sentence should be imposed based on evidence of abnormalities in his brain due to fetal alcohol syndrome, his low mental functioning, and other mental and background mitigation. In performing the proportionality review, this Court has explained:

> "[W]e make a comprehensive analysis in order to determine whether the crime falls within the category of both the most aggravated and the least mitigated of murders, thereby assuring uniformity in the application of the sentence." We consider the totality of the circumstances of the case and compare the case to other capital cases. This entails "a *qualitative* review by this Court of the underlying basis for each aggravator and mitigator rather than a quantitative analysis." In other words, proportionality review "is not a comparison between the number of aggravating and mitigating circumstances."

Williams v. State, 37 So.3d 187, 205 (Fla.2010) (quoting *Offord v. State*, 959 So.2d 187, 191 (Fla.2007) (citations omitted)). This Court has long recognized an obligation to perform a proportionality review.[FN6] *See, e.g., Lamadline v. State*, 303 So.2d 17, 20 (Fla.1974).

> FN5. Rule 9.142(a)(5), Florida Rule of Appellate Procedure, provides that "[i]n death penalty cases, whether or not insufficiency of the evidence or proportionality is an issue presented for review, the court shall review these issues and, if necessary, remand for the appropriate relief."

[11][12][13][14] In reviewing proportionality, this Court follows precedent that requires that the death penalty be "reserved only for those cases where the most aggravating and least mitigating circumstances exist." *Terry v. State*, 668 So.2d 954, 965 (Fla.1996). In doing so, we "will not disturb the sentencing judge's determination as to 'the relative weight to give to each established mitigator' where that ruling is 'supported by competent, substantial evidence in the record.' " *Blackwood v. State*, 777 So.2d 399, 412–13 (Fla.2000) (quoting *Spencer v. State*, 691 So.2d 1062, 1064 (Fla.1996)). We "review the weight the trial court ascribes to mitigating factors under the abuse of discretion standard." *Smith v. State*, 998 So.2d 516, 527 (Fla.2008). The Court will also "affirm the weight given an aggravator if based on competent substantial evidence." *Blake v. State*, 972 So.2d 839, 846 (Fla.2007). "The weight to be given aggravating factors is within the discretion of the trial court, and it is subject to the abuse of discretion standard." *Buzia v. State*, 926 So.2d 1203, 1216 (Fla.2006).

Hurst contends, inter alia, that his case is similar to *Cooper v. State*, 739 So.2d 82, 86 (Fla.1999), in which the Court vacated the death sentence and imposed a life sentence on the basis of lack of proportionality when compared to other capital cases. In *Cooper*, the evidence showed the defendant was eighteen years old at the time of *448 the crime. Cooper also suffered from borderline mental retardation, brain damage likely caused by beatings and head trauma as a child, a history of seizures, schizophrenia, cognitive brain impairment, and an abusive childhood

© 2014 Thomson Reuters. No Claim to Orig. US Gov. Works.

147 So.3d 435, 39 Fla. L. Weekly S293
(Cite as: 147 So.3d 435)

including being repeatedly threatened with a gun by his father. The trial court in *Cooper* found three aggravators and two statutory mitigators, as well as other nonstatutory mitigation. We conclude that although there was more aggravation in *Cooper*, there was also more mitigation than is present in this case. *Cooper* does not require us to find Hurst's sentence disproportionate.

The State relies on *Jeffries v. State*, 797 So.2d 573 (Fla.2001), as a basis on which to find the sentence in this case proportional. In *Jeffries*, the murder occurred in a somewhat similar manner to the instant case—the victim was stabbed, suffering multiple sharp force injuries, and was beaten. *Id.* at 575. The trial court found two aggravators, murder in course of commission of a robbery and HAC. *Id.* at 576. The mitigation included findings that the defendant's capacity to appreciate the criminality of his conduct was impaired, that the codefendant was equally culpable and received a plea deal for a twenty-year sentence, and that Jeffries had a long history of emotional and mental problems, as well as drug and alcohol abuse. We held that the death sentence in *Jeffries* was proportional when compared to other capital cases. *Id.* at 583.

More recently, in *Allen v. State*, 137 So.3d 946, (Fla.2013), we found the death sentence proportionate. The victim was bound and had chemicals poured on her face. Allen beat the victim with belts, put a belt around her neck and, in spite of her pleas to stop, strangled her. The autopsy also revealed facial bruising, bruising on the torso, hand, thigh, knee, and shoulder; and the victim had contusions on her hands, face, and torso. Her hands showed ligature marks from having been tied, and her neck showed signs of ligature. *Id.* at 951–53.

The trial court in *Allen* found two aggravators—commission of the murder in the course of committing or attempting to commit a kidnapping, and that the murder was especially heinous, atrocious, or cruel. *Id.* at 954–55. The nonstatutory mitigation found by the court included that Allen had been the victim of physical and possibly sexual abuse, had brain damage due to numerous prior head injuries resulting in lack of impulse control, suffered a poor childhood environment, and exhibited helpfulness. The evidence also showed that Allen had significant organic brain damage and intracranial injuries, and was at the lower end of intellectual capacity. Testimony was received that a PET scan revealed at least ten brain injuries, mostly to the right side of Allen's brain which would affect impulse control, judgment, and mood, and would make it hard for her to conform her conduct to the requirements of society. We found the death sentence in *Allen* proportionate when compared to sentences in other capital cases. *Id.* at 968–69.

Similarly, in *Rogers v. State*, 783 So.2d 980 (Fla.2001), the victim was murdered by being brutally stabbed, and had bruises, abrasions, and a shallow defensive wound to her arm. *Id.* at 986. The trial court found two aggravators—that the murder was committed for pecuniary gain and that it was especially heinous, atrocious, or cruel. *Id.* at 987. The court found one statutory mitigator—that the defendant's capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of law was substantially impaired. *Id.* This last mitigating factor was based on the trial court's finding that Rogers suffers from psychosis and brain damage*449 that may have been exacerbated by long-term alcohol abuse. *Id.* at 996. The trial court found other mitigation in Rogers' difficult family background, abusive childhood, and his exhibition of good qualities as a father and employee. *Id.* We upheld the death sentence in *Rogers* as proportionate.

Based on the forgoing, we find that Hurst's death sentence, when compared to the death sentences in other comparable capital cases, is proportionate.

CONCLUSION

For the reasons expressed above, we affirm

© 2014 Thomson Reuters. No Claim to Orig. US Gov. Works.

147 So.3d 435, 39 Fla. L. Weekly S293
(Cite as: 147 So.3d 435)

Hurst's sentence of death for the first-degree murder of Cynthia Harrison.

It is so ordered.

POLSTON, C.J., and LEWIS, QUINCE, and CANADY, JJ., concur.
PARIENTE, J., concurs in part and dissents in part with an opinion, in which LABARGA and PERRY, JJ., concur.
PARIENTE, J., concurring in part and dissenting in part.

I concur in the majority's conclusion that the trial court did not abuse its discretion in denying Hurst a successive mental retardation hearing pursuant to Florida Rule of Criminal Procedure 3.203 prior to the new sentencing proceeding. I dissent, however, from the majority's affirmance of Hurst's sentence of death because there was no unanimous jury finding of either of the two aggravating circumstances found by the trial judge—that the murder was heinous, atrocious, or cruel; and that the murder was committed in the course of a robbery.

No jury ever convicted Hurst of the contemporaneous robbery, so this case does not fall within the exception to the constitutional requirement of juror unanimity for a contemporaneous felony conviction or a prior violent felony conviction as an aggravating circumstance, which automatically demonstrate that the jury has made the necessary findings to warrant the possibility of a death sentence. *See Johnson v. State*, 969 So.2d 938, 961 (Fla.2007) (rejecting a challenge to the constitutionality of the defendant's death sentence because the "murder in the course of a felony aggravator" was premised on separate convictions, "which satisfies Sixth Amendment requirements").

In Hurst's case, the jury recommended death by the slimmest margin permitted under Florida law—a bare majority seven-to-five vote. Because a penalty-phase jury in Florida is not required to make specific factual findings as to the aggravating circumstances necessary to impose the death penalty pursuant to Florida's capital sentencing statute, it is actually possible that there was not even a majority of jurors who agreed that the same aggravator applied. *See Peterson v. State*, 94 So.3d 514, 540 (Fla.2012) (Pariente, J., concurring as to conviction and dissenting as to sentence). In my view, Hurst's death sentence cannot be constitutionally imposed, consistent with the United States Supreme Court's decision in *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), and Florida's right to trial by jury, in the absence of a unanimous finding by the jury that any of the applicable aggravators apply, which is not present here.

I have previously expressed my view that "[t]he absence of a requirement of a unanimous jury finding as a precondition to a sentence of death is ... a matter of constitutional significance." *Butler v. State*, 842 So.2d 817, 838 (Fla.2003) (Pariente, J., concurring in part and dissenting in part). Indeed, I continue to believe that, in light of *Ring*, Florida's death penalty statute, as applied in circumstances like those presented*450 in this case where there is no unanimous jury finding as to any of the aggravating circumstances, is unconstitutional. *See Peterson*, 94 So.3d at 538 (Pariente, J., concurring as to conviction and dissenting as to sentence).

As I stated in my opinion dissenting as to the affirmance of the death sentence in *Peterson*:

> Under our current sentencing scheme, not all defendants who are convicted of first-degree murder are eligible for a sentence of death. The trial judge must make additional findings before the death penalty can be imposed. *See generally* § 775.082, Fla. Stat. (2011). Without these findings, a trial court cannot impose a higher sentence than life imprisonment on the basis of the verdict alone. *See* § 775.082(1), Fla. Stat. (stating that without findings by the court that a defendant "shall be punished

© 2014 Thomson Reuters. No Claim to Orig. US Gov. Works.

by death, ... such person shall be punished by life imprisonment"). It is only after a sentencing hearing and additional findings of fact regarding aggravators and mitigators that the sentence of death may be imposed. Not only is this requirement imposed by Florida law, but it is constitutionally mandated by the Eighth Amendment to prevent death sentences from being arbitrarily imposed.

In addition, as interpreted by the United States Supreme Court in *Ring*, the Sixth Amendment requires that a jury find those aggravating factors. As Justice Scalia explained in his concurring opinion in *Ring*, the bottom line is that "the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives—whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—must be found by a jury." *Ring*, 536 U.S. at 610, 122 S.Ct. 2428 (Scalia, J., concurring).

Id. at 538–39.

"Apart from capital sentencing, the requirement of unanimity has been scrupulously honored in the criminal law of this state for any finding of guilt and for any fact that increases the maximum punishment." *Butler*, 842 So.2d at 837 (Pariente, J., concurring in part and dissenting in part). "Florida's exclusion of the death penalty from the requirement of jury unanimity cannot be reconciled" with the Supreme Court's holdings in *Ring* that "[t]he right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death," and that "the Sixth Amendment applies to both." *Peterson*, 94 So.3d at 539 (Pariente, J., concurring as to conviction and dissenting as to sentence) (quoting *Ring*, 536 U.S. at 609, 122 S.Ct. 2428) (emphasis omitted).

It remains my view that *Ring* requires any fact that qualifies a capital defendant for a sentence of death to be found by a jury, and that Florida's state constitutional right to trial by jury, which is embodied in article I, section 22, of the Florida Constitution, "requires a unanimous jury finding beyond a reasonable doubt on the existence of any element necessary to increase an authorized punishment, most especially the ultimate punishment of the death penalty." *Butler*, 842 So.2d at 838 (Pariente, J., concurring in part and dissenting in part); *see also Coday v. State*, 946 So.2d 988, 1022 (Fla.2006) (Pariente, J., concurring in part and dissenting in part). In other words, article I, section 22, is violated in the rare case where the death penalty is imposed without any of the aggravators that automatically demonstrate that a jury has made the necessary findings to *451 warrant the possibility of a death sentence, such as a prior violent felony conviction or that the murder occurred while in the course of an enumerated felony that was also found by a jury. This is one of those rare cases.

This case also illustrates how the use of a special verdict form would help solve the problem, as Hurst's counsel requested an interrogatory verdict to specify the aggravators found by the jury and the votes on each, but the motion was denied in accordance with this Court's case law preventing the use of penalty-phase special verdict forms detailing the jurors' determination concerning aggravating factors. *See State v. Steele*, 921 So.2d 538, 545 (Fla.2005). Had the jury been permitted to specify its findings, it is possible that this Court would have evidence in the record that Hurst's jury unanimously found the existence of one of the aggravators found by the trial judge in imposing the death sentence, thereby curing the constitutional infirmity in this case. Because the jury was not permitted to indicate its findings, however, this evidence does not appear in our record.

I have previously expressed my view as to the "difficulties created" by this Court's decisions that fail

© 2014 Thomson Reuters. No Claim to Orig. US Gov. Works.

to allow or mandate the use of special interrogatories in death penalty cases to permit the jury to make special findings as to the aggravators. *Aguirre–Jarquin v. State*, 9 So.3d 593, 610 (Fla.2009) (Pariente, J., specially concurring). I once again renew this position here, as the use of a special verdict form during the penalty phase would enable this Court "to tell when a jury has unanimously found a death-qualifying aggravating circumstance, which would both facilitate our proportionality review and satisfy the constitutional guarantee of trial by jury even when the recommendation of death is less than unanimous." *Coday*, 946 So.2d at 1024 (Pariente, J., concurring in part and dissenting in part).

Finally, I also take this opportunity to note an evolving concern as to the possible Eighth Amendment implications of Florida's outlier status, among those decreasing number of states that still retain the death penalty, on the issue of jury unanimity in death penalty cases.[FN6] Except for Florida, every state that imposes the death penalty, as well as the federal system, requires a unanimous jury verdict as to the finding of an aggravating circumstance. [FN7] This means that in *no other state or federal court in the country* would Hurst have been sentenced to death in this case in the absence of a unanimous jury finding of an aggravating circumstance. Florida is a clear outlier.[FN8]

FN6. Since *Ring* was decided in 2002, six states—Connecticut, Illinois, Maryland, New Jersey, New Mexico, and New York—have abolished the death penalty.

FN7. In *Steele*, 921 So.2d at 548–49, this Court explained that, aside from Florida, only Utah and Virginia did not at that time require a unanimous jury finding of aggravators. Subsequent state supreme court decisions in those two states have concluded that a unanimous jury finding of an aggravating circumstance is required. *See Prieto v. Commonwealth*, 278 Va. 366, 682 S.E.2d 910, 935 (2009) ("[W]e hold that in the penalty phase of capital murder trials the death penalty may not be imposed unless the jury unanimously finds either one or both of the aggravating factors of 'vileness' or 'future dangerousness' beyond a reasonable doubt."); *Archuleta v. Galetka*, 267 P.3d 232, 259 (Utah 2011) ("In Utah, the fact finder in the guilt phase must find—unanimously and beyond a reasonable doubt—the statutory aggravator that makes death a possible sentence.").

FN8. In addition to Florida's outlier status as the only state in the country that allows the death penalty to be imposed without a unanimous jury finding of an aggravating circumstance, Florida is also one of the only states to permit the jury to recommend death by a less than unanimous vote.

*452 In *Steele*, 921 So.2d at 548–49, this Court urged the Legislature to reexamine Florida's capital sentencing statute in light of *Ring* and Florida's outlier status. I have also previously echoed this suggestion, encouraging the Legislature to bring Florida "closer to the mainstream of capital sentencing states in regard to jury findings." *Coday*, 946 So.2d at 1025 (Pariente, J., concurring in part and dissenting in part).

Although those calls for legislative action have arisen primarily due to *Ring* and Sixth Amendment concerns, the Eighth Amendment ramifications of Florida's outlier status are also clear. For example, two Justices on the United States Supreme Court have recently expressed "deep concerns" about the federal constitutionality of Alabama's death penalty statute in light of its outlier status on the issue of jury overrides. *See Woodward v. Alabama*, ——U.S. ——, 134 S.Ct. 405, 405, 187 L.Ed.2d 449 (2013) (Sotomayor, J., with whom Justice Breyer joins as to Parts I and II, dissenting from denial of certiorari).

© 2014 Thomson Reuters. No Claim to Orig. US Gov. Works.

The United States Supreme Court has repeatedly explained that "death is different" from every other form of punishment. *See, e.g., Ring*, 536 U.S. at 605–06, 122 S.Ct. 2428; *Harmelin v. Michigan*, 501 U.S. 957, 994, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991); *Gardner v. Florida*, 430 U.S. 349, 357, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977). The Supreme Court has also emphasized the "heightened reliability demanded by the Eighth Amendment in the determination whether the death penalty is appropriate in a particular case." *Sumner v. Shuman*, 483 U.S. 66, 72, 107 S.Ct. 2716, 97 L.Ed.2d 56 (1987). As this Court has pointed out, "[m]any courts and scholars have recognized the value of unanimous verdicts," particularly given that the "reliability" of death sentences "depends on adhering to guided procedures that promote a reasoned judgment by the trier of fact." *Steele*, 921 So.2d at 549 (quoting *State v. Daniels*, 207 Conn. 374, 542 A.2d 306, 315 (1988)).

While questions of public policy regarding Florida's capital sentencing statute are left to the Legislature, the Sixth and Eighth Amendment implications of Florida's outlier status on the lack of jury unanimity, which threaten to unravel our entire death penalty scheme, should be of serious concern. I once again urge the Legislature, as has former Justice Cantero, to revisit this issue in Florida's capital sentencing scheme.

For all these reasons, I dissent from the majority's affirmance of Hurst's death sentence because there is no unanimous finding by the jury that any of the applicable aggravators apply. The absence of juror unanimity in the fact-finding necessary to impose the death penalty remains, in my view, an independent violation of Florida's constitutional right to trial by jury.

LABARGA and PERRY, JJ., concur.

Fla.,2014.
Hurst v. State
147 So.3d 435, 39 Fla. L. Weekly S293

END OF DOCUMENT

© 2014 Thomson Reuters. No Claim to Orig. US Gov. Works.

APPENDIX B

Supreme Court of Florida

THURSDAY, SEPTEMBER 4, 2014

CASE NO.: SC12-1947
Lower Tribunal No(s).: 1998-CF-001795-A

TIMOTHY LEE HURST vs. STATE OF FLORIDA

Appellant(s) Appellee(s)

Appellant's Motion for Rehearing is hereby denied.

LABARGA, C.J., and PARIENTE, LEWIS, QUINCE, CANADY, POLSTON, and PERRY, JJ., concur.

A True Copy
Test:

John A. Tomasino
Clerk, Supreme Court

tw
Served:

WILLIAM CARL MCLAIN
STEPHEN RICHARD WHITE
HON. PAM CHILDERS, CLERK
HON. LINDA LEE NOBLES, JUDGE
JOHN A. MOLCHAN

RECEIVED
SEP 08 2014
PUBLIC DEFENDER
JUDICIAL CIRCUIT

RECORD
AND
BRIEFS

NO. 14-7505

IN THE SUPREME COURT OF THE UNITED STATES

TIMOTHY LEE HURST,

Petitioner,

v.

STATE OF FLORIDA

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE FLORIDA SUPREME COURT

BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

PAMELA JO BONDI
ATTORNEY GENERAL OF FLORIDA

CAROLYN M. SNURKOWSKI*
Associate Deputy Attorney General
*Counsel of Record
Florida Bar No. 159089

Carine L. Emplit
Assistant Attorney General

Office of the Attorney General
PL-01, The Capitol
Tallahassee, Fl 32399-1050
Carolyn.Snurkowski@myfloridalegal.com
(850) 414-3300 Ext. 4579
(850) 487-0997 (FAX)

COUNSEL FOR RESPONDENT

Library of Congress
Law Library

QUESTIONS PRESENTED

(restated)

SHOULD THIS COURT REVIEW THE FLORIDA SUPREME COURT'S DECISION HOLDING THAT A DEFENDANT, IN THE PENALTY PHASE OF A CAPITAL CASE, HAS NO RIGHT TO A JURY DETERMINATION OF WHETHER HE IS INTELLECTUALLY DISABLED?

SHOULD THIS COURT REVIEW THE FLORIDA SUPREME COURT'S DECISION THAT *RING V. ARIZONA*, 536 U.S. 584 (2002), HAS NO APPLICATION TO FLORIDA'S CAPITAL SENTENCING STATUTE WHEN THE JURY FOUND, BEYOND A REASONABLE DOUBT, PETITIONER GUILTY OF A DEATH PENALTY QUALIFYING AGGRAVATING CIRCUMSTANCE, AND THE JURY RECOMMENDED DEATH?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

Table of authorities iii

OPINION BELOW 1

JURISDICTION 1

STATEMENT OF THE CASE AND PROCEDURAL HISTORY 1

REASONS FOR DENYING THE WRIT (ISSUE I) 9

I. The Decision of the Florida Supreme Court. 9

II. No Conflicting Decisions. 10

III. Decisions of the United States Supreme Court. 11

REASONS FOR DENYING THE WRIT (ISSUE II). 13

I. The Decision of the Florida Supreme Court. 14

II. Petitioner's Death Recommendation Satisfies *Ring*. 15

CONCLUSION 17

TABLE OF AUTHORITIES

Cases

Abdool v. St. of Fla., 53 So. 3d 208 (Fla. 2011), *cert. denied*, 132 S.Ct. 149 (2011) ...16

Apprendi v. New Jersey, 530 U.S. 466 (2000) ...13

Baker v. St. of Fla., 71 So. 3d 802 (Fla. 2011), *cert. denied*, 132 S.Ct. 1639 (2012) ..16

Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002) ...9

Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002), *cert. denied*, 537 U.S. 1070 (2002)...16

Braddy v. St. of Fla., 111 So. 3d 810 (Fla. 2012), *cert. denied*, 134 S.Ct. 275 (2013) ...16

Chandler v. St. of Fla., 75 So. 3d 267 (Fla. 2011), *cert. denied*, 132 S.Ct. 607 (2011) ...16

Davis v. St. of Fla., 2 So. 3d 952 (Fla. 2008), *cert. denied*, 557 U.S. 940 (2009) ...16

Duest v. St. of Fla., 855 So. 2d 33 (Fla. 2003), *cert. denied*, 541 U.S. 993 (2004) ...16

Ellerbee v. St. of Fla., 87 So. 3d 730 (Fla. 2012), *cert. denied*, 133 S.Ct. 844 (2013) ...16

Evans v. Sec'y, Fla. Dept. of Corr., 699 F.3d 1249 (11th Cir 2012) ...8, 15

Frances v. St. of Fla., 970 So. 2d 806 (Fla. 2007), *cert. denied*, 553 U.S. 1039 (2008) ...16

Head v. Hill, 277 Ga. 255, 587 S.E.2d 613 (2003) ...10

Hodges v. State, 55 So.3d 515 (Fla.2010) ...9

Hurst v. State, 147 So.3d 435 (Fla. 2014) ...1, 2, 7, 8, 13, 14, 15

In re Johnson, 334 F.3d 403 (5th Cir. 2003) ...11

Jones v. United States, 526 U.S. 227 (1999) 15

Kansas v. Marsh, 548 U.S. 163, 126 S.Ct. 2516 (2006) 12

Kilgore v. State, 55 So.3d 487 (Fla. 2010) 9

King v. Moore, 831 So. 2d 143 (Fla. 2002), *cert. denied*, 537 U.S. 1067 (2002) 16

Lawrence v. St. of Fla., 846 So. 2d 440 (Fla. 2003), *cert. denied*, 540 U.S. 952 (2003) 16

Marshall v. Crosby, 911 So. 2d 1129 (Fla. 2005), *cert. denied*, 547 U.S. 1143 (2006) 16

McGirth v. St. of Fla., 48 So. 3d 777 (Fla. 2010), *cert. denied*, 131 S.Ct. 2100 (2011) (Case No. 10 – 8845) 16

Merck v. St. of Fla., 975 So. 2d 1054, *cert. denied*, 555 U.S. 840 (2008) 16

Peterson v. St. of Fla., 2 So. 3d 146 (Fla. 2009), *cert. denied*, 558 U.S. 885 (2009) 16

Peterson v. St. of Fla., 94 So. 3d 514 (Fla. 2012) 16

Peterson v. State, 94 So.3d 514 (Fla.) 16

Ring v. Arizona, 536 U.S. 584 (2002) 9, 13, 14

Rodriguez v. State, 919 So.2d 1252 (Fla. 2005) 9

Russell v. State, 849 So. 2d 95 (Miss. 2003) 10

Schiro v. Smith, 546 U.S. 6, 126 S.Ct. 7 (2005) 11

State v. Flores, 135 N.M. 759 (N.M. 2004) 10

State v. Williams, 831 So. 2d 835 (La. 2002) 10

Zommer v. St. of Fla., 31 So. 3d 733 (Fla. 2010), *cert. denied*, 131 S.Ct. 192 (2010) 16

Statutes

28 U.S.C. § 1257 (2014) 1

IN THE SUPREME COURT OF THE UNITED STATES

NO. 14-7505

TIMOTHY LEE HURST, *Petitioner*,

v.

STATE OF FLORIDA, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE FLORIDA SUPREME COURT

BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

Petitioner Timothy Lee Hurst seeks a writ of certiorari from the May 1, 2014 opinion of the Florida Supreme Court affirming his conviction and sentence of death. The opinion is reported at *Hurst v. State*, 147 So.3d 435 (Fla. 2014) (attached as "Appendix A" to Hurst 's Petition for Writ of Certiorari).

JURISDICTION

This Petition seeks review of a decision from the Florida Supreme Court, and therefore jurisdiction is conferred pursuant to 28 U.S.C. § 1257 (2014).

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On May 2, 1998, the body of murder-victim Cynthia Lee Harrison, a manager at a Popeye's Fried Chicken restaurant in Escambia County, was found in the freezer

at her place of employment. She had been bound, gagged, and stabbed multiple times. *Hurst v. State,* 147 So.3d 435, 437 (Fla. 2014).

On May 26, 1998, Petitioner Timothy Lee Hurst, a fellow employee at Popeye's, was indicted for First Degree Pre-Meditated Murder/Felony Murder with a Weapon of Ms. Harrison. (R [SC00-1042]/I 1-2)

On March 23, 2000, a jury found Petitioner Hurst guilty as charged of First Degree Murder. (R [SC00-1042]/III 448) The jury recommended the death sentence by 11-1 vote. (R [SC00-1042]/III 450)

On April 26, 2000, the trial court sentenced Hurst to death. (R [SC00-1042]/III 469-489)

Following a direct appeal to the Florida Supreme Court, a post-conviction evidentiary hearing before the trial court, and an appeal on the post-conviction hearing before the Florida Supreme Court, the case was remanded to the trial court for a new jury penalty phase. *Hurst* at 439-40.

Before the second penalty phase, Hurst filed a Motion to Declare Defendant's Mental Retardation as a Bar to Execution and Request for Hearing which the trial court denied. (R [S12-1947]/II 309-17) Thereafter, in March, 2012, a second jury penalty phase occurred. The defense argued to the jury that Hurst was intellectually disabled[1] and that he had brain damage. (R [SC12-1042]/VI 240-41)

---

[1] Although the opinion refers to "mentally retarded," this Brief in Opposition refers to the identical condition as "intellectually disabled" in light of this Court's ruling in *Hall v. Florida*, 134

In support of his tendered defenses, Hurst put on several lay witnesses and two mental health experts to demonstrate that he was intellectually disabled.

Dr. Krop, a psychologist, testified for Hurst. He told the jury that in January 2012, he saw Hurst for the first time and administered the WAIS-IV and the TOMM. (R [S12-1947]/ VIII 627-28) Krop said that Hurst "put forth good effort," "seemed to have good concentration," and was "attentive." (R [S12-1947]/VIII 632) Krop's 2012 testing resulted in a full-scale IQ score of 69, which Krop said "is in the category of mental retardation." (R [S12-1947]/VIII 632)

Krop said that Hurst's grade point average was 1.2, which is a "D" average, that Hurst repeated 10th grade, and that Hurst did not complete his degree or certificate. (R [S12-1947]/VIII 637-38)

Krop summarized:

> He was low average on most of the neuropsychological testing. But there was also some of the testing which suggested either borderline or mild impairment.
>
> I noticed in reviewing one of the previous psychologist's evaluation, and it was not a full neuropsychological testing, but there were certain neuropsychological tests, particularly one that measures executive functions or what we call frontal lobe functions that showed mild impairment. That was one of the other things that triggered what I thought was important, to take a look at a more comprehensive neuropsychological battery.

(R [S12-1947]/VIII 639)

S.Ct. 1986 (U.S. 2014) and Fla. Stat. § 921.137 (2014).

Krop concluded that Hurst meets the criteria for intellectual disability (R [S12-1947]/VIII 636, 640) and said that he "did not see any other diagnosable psychiatric disorder." (R [S12-1947]/VIII 646)

Krop acknowledged that earlier IQ tests, administrered before the first penalty phase, scored at around 77 or 78 on an earlier version of the WAIS, which he said was not as accurate as the WAIS-IV. (R [S12-1947]/VIII 649-50, 652-53)

Dr. Taub, a psychologist at the University of Central Florida, also testified for Hurst. (R [S12-1947]/VIII 655) He concluded that Hurst's IQ score of 69 was in the intellectually disabled range. (R [S12-1947]/VIII 680, 716) On cross-examination, Taub admitted that he had not been provided with Dr. Riebsame's data (the first doctor to administer the test to Hurst prior to the first penalty phase). (R [S12-1947]/VIII 718) On cross-examination, Taub was questioned about Hurst's mental capacity to take money and hide it at someone else's house (R [S12-1947]/VIII 723-25), Hurst knowing to take his pants, which had blood on them, to another person's house for washing (R [S12-1947]/VIII 725), Hurst directing that evidence be disposed of (R [S12-1947]/VIII 725), Hurst having a driver's license (R [S12-1947]/VIII 726), Hurst having a job and being able to be a cashier as long as it is repetitive. (R [S12-1947]/ VIII 726-27) Dr. Taub conceded that it required a "little bit higher level" of thinking to direct another to dispose of evidence of a crime. R [S12-1947]/VIII 725)

The defense rested without Hurst testifying. (R [S12-1947]/VIII 730)

In rebuttal, the State called psychologist Dr. Harry McClaren as a witness. (R [S12-1947]/VIII 731) McClaren reviewed various aspects of the record, reviewed the reports and data of Dr. McClain and Dr. Larson, reviewed D.O.C.'s mental health records, and reviewed the depositions of Dr. Taub and Dr. Krop and listened to their testimony as well as Hurst's lay witnesses. (R [S12-1947]/VIII 734-35) He also read a transcript of, and listened to, an audiotape of Hurst's statement to the police. (R [S12-1947]/VIII 735) He reviewed Hurst's school records. (R [S12-1947]/VIII 737)

McClaren testified concerning Hurst malingering and the WAIS. (R [S12-1947]/ VIII 735-36)

He concluded that Hurst, although below average in intellect, did not meet Florida's definition of intellectual disability. (R [S12-1947]/VIII 737- 39) He explained that, in terms of the ability to measure intellect, the WAIS-III and WAIS-IV are very highly correlated with each other. (R [S12-1947]/VIII 741 42) He explained that Hurst, in 2003 and 2004, was able to score a 76 on Dr. Riebsame's IQ test, which was the first administration, and he also scored a 78 in separate IQ-testing. (R [S12-1947]/VIII 741) He "wonder[ed] if there was other factors at work that would make" Hurst's scores "go down so much" from 78 to 69 (R [S12-1947]/VIII 742).

Dr. McClaren pointed to Hurst's performance on the California Achievement Test "showing much better achievement that would be expected of someone of an I.Q. of 70 or below." (R [S12-1947]/VIII 743)

Investigator Nesmith was also called in rebuttal. He authenticated a tape recording of Hurst's statement in his interview of Hurst. (R [S12-1947]/VIII 746-47) The tape was played for the jury. (R [S12-1947]/VIII 748-64) The interview revealed Hurst's ability to recount the morning's events; to recall phone numbers; to provide directions; and to lie to conceal his involvement in the murder. (R [S12-1947]/VIII 750-55)

After the Judge's colloquy of Hurst (VIII 771-72), the attorneys' closing arguments (R [S12-1947]/IX 783-823), and the Judge's jury instructions (R [S12-1947]/IX 823-40), the jury voted 7 to 5 to recommend the death sentence (R [S12-1947]/IX 848-51; III 463).

On August 16, 2012, the Honorable Linda Nobles sentenced Hurst to death. (R [S12-1947]/III 556-86) The Judge's Sentencing Order reviewed aspects of the facts and law, then found as aggravators HAC and during the commission of a robbery (R [S12-1947]/III 575 79), affording them each great weight. The trial court rejected each proposed statutory mitigator except for no significant prior criminal history and Hurst's age at the time of the murder, which the trial court afforded moderate weight. (R [S12-1947]/ III 579-83) The trial court gave moderate weight to the nonstatutory mitigator of a limited intellectual capacity. (R [S12-1947]/III 583-85)

The trial court specifically found that Hurst was not intellectually disabled. *Hurst* at 440. In making that finding, the trial court relied on the testimony and evidence presented at trial, including: Hurst was able to maintain a job; he had a

driver's license; he made statements to the police in an attempt to conceal his involvement in the murder; during his statement to police, he was able to recount the morning's events, give directions, recall telephone numbers, and deliberately omit incriminating information; he attempted to clean up the murder scene; washed his clothes; hid the money in an another location; discarded Ms. Harrison's belongings and his shoes; and he bought new shoes. (R [S12-1947]/III 571)

Hurst appealed to the Florida Supreme Court, raising three issues. First, that the trial court erred in refusing to give him a separate evidentiary hearing on his successive intellectual disability claim. The Florida Supreme Court rejected this argument finding that the trial court had not abused its discretion in denying Hurst a second evidentiary hearing because he had previously presented such evidence at his first evidentiary hearing and was not found to be intellectually disabled. The Supreme Court further noted that any error in denying the evidentiary hearing was harmless because Hurst was permitted to present all of his intellectual disability evidence at the penalty phase, after which the trial court ruled that he failed to establish that he was intellectually disabled. *Hurst* at 441-42.

Second, Hurst argued that the Florida Supreme Court should have receded from precedent holding that the jury need not expressly find specific aggravators or issue a unanimous advisory verdict on the sentence. Hurst argued that the facts of his case support the conclusion that *Ring* applies to require the jury to expressly find one or more aggravators and to issue its recommendation based on a unanimous advisory verdict because his case did not involve a conviction of a prior

violent felony or that the murder was committed in the course of a felony. *Id.* at 446. The Florida Supreme Court, in relying on state precedent, as well as *Evans v. Sec'y, Fla Dep't of Corr.*, 669 F.3d 1249 (11th Cir. 2012), *cert denied,* rejected Hurst's claim, finding that the Florida sentencing procedures do not provide for jury input about the existence of aggravating factors prior to sentencing. *Id.* at 447.

Third, Hurst argued that his death sentence was not proportionate in light of the abnormalities in his brain due to fetal alcohol syndrome, his low mental functioning and other mental and background mitigation. *Id.* The Florida Supreme Court conducted its proportionality review and found that Hurst's death sentence was proportionate when compared to the death sentences in other comparable capital cases. *Id.* at 449.

The Florida Supreme Court denied Hurst relief on each of his claims and affirmed his conviction and sentence. *Hurst* at 449. It also denied his motion for rehearing (attached as "Appendix B" to Hurst's Petition for Writ of Certiorari). Thereafter, Hurst filed his Petition for Writ of Certiorari.

REASONS FOR DENYING THE WRIT

I.

PETITIONER'S ATTEMPT TO EXTEND THIS COURT'S RULING IN *RING V. ARIZONA*, TO REQUIRE THE JURY, IN THE PENALTY PHASE OF A CAPITAL CASE, TO DETERMINE WHETHER HE IS INTELLECTUALLY DISABLED HAS BEEN CONSISTENTLY REJECTED. THE DECISION OF THE FLORIDA SUPREME COURT DOES NOT CONFLICT WITH ANY DECISION FROM THIS COURT, ANY FEDERAL COURT OF APPEAL, OR ANY STATE COURT OF LAST RESORT.

Hurst contends that under *Ring*[2], the jury must consider and find a defendant's intellectual disability beyond a reasonable doubt. Review should be denied.

I. **Decisions of the Florida Supreme Court.**

The Florida Supreme Court has repeatedly held that a defendant has no right to a jury determination of whether he is intellectually disabled. *See Hodges v. State*, 55 So.3d 515, 526 (Fla.2010) (holding that defendant is not entitled to a jury determination of his mental retardation status), *cert. denied*, — U.S. ——, 132 S.Ct. 164, 181 L.Ed.2d 77 (2011); *Kilgore v. State*, 55 So.3d 487, 510–11 (Fla. 2010) (reiterating that the capital defendant has no right under *Atkins* to a jury determination on whether he is mentally retarded); *Rodriguez v. State*, 919 So.2d 1252, 1267 (Fla. 2005) (same); *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002) (rejecting the defendant's *Atkins* claim on the ground that the trial judge had found the defendant not to be mentally retarded).

---

[2] *Ring v. Arizona*, 536 U.S. 584 (2002).

II. No Conflicting Decisions.

Other state supreme courts have reached the same conclusion. *See, e.g., Head v. Hill*, 277 Ga. 255, 587 S.E.2d 613, 619-21 (2003) (finding "the absence of mental retardation is not the functional equivalent of an element of an offense such that determining its absence or presence requires a jury trial under *Ring*"); *Russell v. State*, 849 So. 2d 95, 148 (Miss. 2003); *State v. Williams*, 831 So. 2d 835, 860 n. 35 (La. 2002).

In *State v. Flores*, 135 N.M. 759 (N.M. 2004), the New Mexico Supreme Court found,

> Defendant argues that, after *Atkins*, mental retardation is a factual issue upon which a defendant's eligibility for death depends, and that, applying *Ring*, the absence of mental retardation is the functional equivalent of an element of a greater offense and therefore must be proved to a jury beyond a reasonable doubt. We do not believe the absence of mental retardation is an element of a capital offense for purposes of analysis under *Ring*. *Apprendi* and *Ring* do not apply to cases where the factual finding at issue operates to lower the maximum allowable punishment rather than to raise the punishment above the statutory maximum. Here, a finding of mental retardation operates to reduce the maximum possible sentence from capital punishment to life in prison, and therefore the absence of mental retardation is not an element that must be proved by the State beyond a reasonable doubt.

Id. at 762.

The United States Court of Appeals, Fifth Circuit found similarly, in deciding *In re Johnson*, 334 F.3d 403 (5th Cir. 2003) when it held, "[t]he absence of mental

retardation is not an element of the sentence any more than sanity is an element of an offense." *Id.* at 405.

There is no conflict between the Florida Supreme Court's decision and any decision of this Court or any decision of any state court of last resort or federal court of appeals. There is no basis for granting certiorari review of this case. The petition should be denied.

III. **Decisions of the United States Supreme Court.**

This Court addressed the issue of intellectually diability in *Schiro v. Smith*, 546 U.S. 6, 126 S.Ct. 7 (2005). In that case, Smith was convicted of first-degree murder, kidnaping, and sexual assault and was sentenced to death. Smith never argued that he was intellectually disabled or that his intellectual disability served as a bar to death penalty, but he did present evidence in mitigation during the penalty phase of his trial showing that he had low intelligence. *Id.* at 6-7. The convictions and sentence were affirmed on direct appeal, and Smith's state petitions for postconviction relief were denied. Smith then filed a petition for a writ of habeas corpus in the United States District Court for the District of Arizona. *Id.* at 9.

The District Court denied Smith's petition for habeas corpus. Following several appeals, remands and petitions for certiorari to this Court, and after this Court had issued its decision in *Atkins*, the case was returned to the Ninth Circuit. Shortly thereafter, Smith argued that he was intellectually diabled and could not be executed under *Atkins*. *Id.* The Ninth Circuit ordered suspension of all federal habeas proceedings and directed Smith to institute proceedings in the trial court to

determine whether the state was prohibited from executing him in line with *Atkins*. The court also ordered that the issue of whether Smith was intellectually diabled had to be determined by a jury. *Id.* at 8.

The State petitioned for certiorari and it was granted. This Court found that the Ninth Circuit erred in ordering the Arizona trial court to conduct a jury trial to resolve Smith's intellectual disability claim. This Court found that, "*Atkins* stated in clear terms that 'we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.'" 536 U.S., at 317, 122 S.Ct. 2242 (quoting *Ford v. Wainwright*, 477 U.S. 399, 416-417, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986); modifications in original)." *Id.* at 9.

This Court, in *Ring*, held that allowing a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty was error. See 497 U.S., at 647-49, 110 S.Ct. 3047. Because Arizona's enumerated aggravating factors operate as "the functional equivalent of an element of a greater offense," *Apprendi*, 530 U.S., at 494, n. 19, 120 S.Ct. 2348, the Sixth Amendment requires that they be found by a jury. Thus, it follows that Ring does not apply when a trial court is presented with facts that a lower sentence should be imposed. Intellectual disability is a mitigator, not an aggravator. *Cf. Kansas v. Marsh*, 548 U.S. 163, 126 S.Ct. 2516 (2006) (overruling the Kansas Supreme Court when it held that that the State was required to prove that a sentence of death was appropriate pursuant to *Ring*).

Based on this precedent, there is no basis for granting certiorari review of this case.

II.

PETITIONER'S ATTEMPT TO EXTEND THIS COURT'S RULING IN *RING v. ARIZONA*, TO THE FLORIDA CAPITAL SENTENCING STATUTE HAS BEEN CONSISTENTLY REJECTED. THE DECISION OF THE FLORIDA SUPREME COURT DOES NOT CONFLICT WITH ANY DECISION FROM THIS COURT, ANY FEDERAL COURT OF APPEAL, OR ANY STATE COURT OF LAST RESORT.

Petitioner requests this Court review the Florida Supreme Court's opinion affirming his sentence of death, arguing that *Ring v. Arizona*, 536 U.S. 584 (2002), questions the constitutionality of Florida's death penalty statute. Review should be denied.

This Court in *Ring* applied its prior opinion in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), to capital cases. *Apprendi* held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490. Immediately following this Court's decision in *Ring*, defendants began to challenge Florida's capital sentencing scheme. But in every case where this question has been presented both this Court and the Florida Supreme Court have declined to grant relief.

In this case, Petitioner does not provide a reason for this Court to review the Florida Supreme Court's denial of the *Ring* challenge to Florida's death penalty statute. Indeed, Petitioner, cannot cite to any decision from any appellate court

that conflicts with the Florida Supreme Court's decision in *Hurst v. State*, 147 So.3d 435 (Fla. 2014). Furthermore, the Florida Supreme Court's decision does not conflict with *Ring*, or any other circuit court, or state court of last resort. *Evans v. Sec'y, Fla. Dept. of Corr.*, 699 F.3d 1249 (11th Cir 2012), *cert. denied*, 133 S.Ct. 2393 (2013) (Case No. 12 – 1134).

I. The Decision of the Florida Supreme Court.

The Florida Supreme Court addressed Hurst's claim on appeal and noted that it has repeatedly rejected invitations to extend this Court's holding in *Ring v. Arizona*, 536 U.S. 584 (2002), to the Florida Capital Sentencing statute. The Florida Supreme Court specifically stated:

> We previously rejected the invitation to revisit our decisions in *Bottoson* and *King* in *Peterson v. State*, 94 So.3d 514 (Fla.), *cert. denied*, — U.S. ——, 133 S.Ct. 793, 184 L.Ed.2d 586 (2012), a case which also did not involve conviction for a prior violent felony or a contemporaneous enumerated felony, and did not involve a unanimous jury advisory verdict. There, the majority stated, "We have consistently rejected claims that Florida's death penalty statute is unconstitutional." *Id.* at 538 (citing *Baker v. State*, 71 So.3d 802, 823–24 (Fla.2011), *cert. denied*, — U.S. ——, 132 S.Ct. 1639, 182 L.Ed.2d 238 (2012); *Darling v. State*, 966 So.2d 366, 387 (Fla.2007); *Frances v. State*, 970 So.2d 806, 822 (Fla.2007)). Similarly, in *Butler v. State*, 842 So.2d 817, 834 (Fla.2003), this Court rejected the *Ring* claim where there was no aggravating factor based on a prior violent felony conviction and there was no unanimous jury advisory sentence. *See also Ault v. State*, 53 So.3d 175, 206 (Fla.2010) ("[T]his Court has repeatedly and continually rejected such claims" that the advisory verdict must be unanimous); *Coday v. State*, 946 So.2d 988, 1006 (Fla.2006) (reiterating that it is not unconstitutional for a jury to be allowed to recommend death by a simple majority vote). We continue to adhere to this same body of precedent.

Hurst at 446.

II. Petitioner's Death Recommendation Satisfies *Ring*.

Petitioner received a recommendation of death from the jury for the murder of Cynthia Lee Harrison by a vote of seven to five. *Hurst* at 445. There was no prior violent felony aggravator in this case, nor did the jury convict Hurst of a contemporaneous felony.

In *Hildwin v. Florida*, 490 U.S. 638 (1989), this Court found, in a case where the jury recommended death, that Florida's capital sentencing statute does not violate the Sixth Amendment right to a jury trial. And, in *Jones v. United States*, 526 U.S. 227, 250-251 (1999), this Court again observed that the Sixth Amendment is not violated when a Florida jury recommends a death sentence. This is so because if a Florida jury makes a sentencing recommendation of death, the jury has "necessarily engag[ed] in the factfinding required for imposition of a higher sentence, that is, the determination that at least one aggravating factor had been proved." *Jones*, 526 U.S. at 250–51. *See also, Evans v. Sec'y, Florida Dept. of Corr.*, 669 F.3d 1249 (11th Cir 2012) (noting that Florida's death sentencing procedures do provide jury input about the existence of aggravating circumstances that was lacking in the Arizona procedures that the Court struck down in *Ring* and in addition to receiving an advisory verdict from the jury the judge is required to give the jury's verdict great weight).

Therefore, because the jury returned a recommendation of death, this Court may infer the jury did find at least one aggravating circumstance beyond a reasonable doubt.

Furthermore, for over a decade this Court has repeatedly denied certiorari review to the Florida Supreme Court in cases which presented the same issue concerning *Ring* on direct appeal.[3] Recently, this Court denied certiorari review in *Peterson v. State*, 94 So. 3d 514 (Fla. 2012), *cert. denied*, 133 S.Ct. 793 (2012) (Case No. 12 – 6741), when there were no contemporaneous corresponding aggravating factors found by the jury, but the jury did recommend the death penalty. Accordingly, certiorari review should be denied.

---

[3] *See Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002), *cert. denied*, 537 U.S. 1070 (2002) (Case No. 02 – 7530); *King v. Moore*, 831 So. 2d 143 (Fla. 2002), *cert. denied*, 537 U.S. 1067 (2002) (Case No. 02 – 7529); *Duest v. St. of Fla.*, 855 So. 2d 33 (Fla. 2003), *cert. denied*, 541 U.S. 993 (2004) (Case No. 03 – 8841); *Lawrence v. St. of Fla.*, 846 So. 2d 440 (Fla. 2003), *cert. denied*, 540 U.S. 952 (2003) (Case No. 03 – 5708); *Marshall v. Crosby*, 911 So. 2d 1129 (Fla. 2005), *cert. denied*, 547 U.S. 1143 (2006) (Case No. 05 – 9181); *Frances v. St. of Fla.*, 970 So. 2d 806 (Fla. 2007), *cert. denied*, 553 U.S. 1039 (2008) (Case No. 07 – 9801); *Merck v. St. of Fla.*, 975 So. 2d 1054, *cert. denied*, 555 U.S. 840 (2008) (Case No. 07 – 10853); *Davis v. St. of Fla.*, 2 So. 3d 952 (Fla. 2008), *cert. denied*, 557 U.S. 940 (2009) (Case No. 08 – 10024); *Peterson v. St. of Fla.*, 2 So. 3d 146 (Fla. 2009), *cert. denied*, 558 U.S. 885 (2009) (Case No. 09 – 5057); *Abdool v. St. of Fla.*, 53 So. 3d 208 (Fla. 2011), *cert. denied*, 132 S.Ct. 149 (2011) (Case No. 10 – 10531); *McGirth v. St. of Fla.*, 48 So. 3d 777 (Fla. 2010), *cert. denied*, 131 S.Ct. 2100 (2011) (Case No. 10 – 8845); *Zommer v. St. of Fla.*, 31 So. 3d 733 (Fla. 2010), *cert. denied*, 131 S.Ct. 192 (2010) (Case No. 09 – 11400); *Baker v. St. of Fla.*, 71 So. 3d 802 (Fla. 2011), *cert. denied*, 132 S.Ct. 1639 (2012) (Case No. 11 – 8053); *Chandler v. St. of Fla.*, 75 So. 3d 267 (Fla. 2011), *cert. denied*, 132 S.Ct. 607 (2011) (Case No. 11 – 7307); *Braddy v. St. of Fla.*, 111 So. 3d 810 (Fla. 2012), *cert. denied*, 134 S.Ct. 275 (2013) (Case No. 13 – 5347); *Ellerbee v. St. of Fla.*, 87 So. 3d 730 (Fla. 2012), *cert. denied*, 133 S.Ct. 844 (2013) (Case No. 12 – 6570); *Peterson v. St. of Fla.*, 94 So. 3d 514 (Fla. 2012), *cert. denied*, 133 S.Ct. 793 (2012) (Case No. 12 – 6741).

CONCLUSION

Respondent respectfully submits that the petition for writ of certiorari should be denied.

Respectfully submitted,
PAMELA JO BONDI
ATTORNEY GENERAL

CAROLYN M. SNURKOWSKI*
Associate Deputy Attorney General
*Counsel of Record
Florida Bar No. 159089
Carine L. Emplit
Assistant Attorney General
Office of the Attorney General
PL-01, The Capitol
Tallahassee, Fl 32399-1050
Carolyn.Snurkowski@myfloridalegal.com
(850) 414-3300 Ext. 4579
(850) 487-0997 (FAX)

COUNSEL FOR RESPONDENT

NO. 14-7505

IN THE SUPREME COURT OF THE UNITED STATES

TIMOTHY LEE HURST, *Petitioner*,

V.

STATE OF FLORIDA, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE FLORIDA SUPREME COURT

BRIEF IN OPPOSITION

TO PETITION FOR WRIT OF CERTIORARI

CERTIFICATE OF SERVICE

I, Carolyn M. Snurkowski, a member of the Bar of this Court, hereby certify that on this 26th day of January, 2015, a copy of the Respondent's Brief in Opposition in the above entitled case was furnished by United States mail, postage prepaid, to David A. Davis, Assistant Public Defender, Leon Co. Courthouse, 301 S. Monroe St., Ste. 401, Tallahassee, FL 32301.

PAMELA JO BONDI
ATTORNEY GENERAL OF FLORIDA

CAROLYN M. SNURKOWSKI*
Associate Deputy Attorney General
*Counsel of Record
Florida Bar No. 159089

Carine L. Emplit
Assistant Attorney General
Office of the Attorney General
PL-01, The Capitol
Tallahassee, Fl 32399-1050
Carolyn.Snurkowski@myfloridalegal.com
(850) 414-3300 Ext. 4579
(850) 487-0997 (FAX)

COUNSEL FOR RESPONDENT

No. 14-7505

IN THE

Supreme Court of the United States

Supreme Court, U.S.
FILED
MAY 28 2015
OFFICE OF THE CLERK

TIMOTHY LEE HURST,
Petitioner,

v.

FLORIDA,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF FLORIDA

JOINT APPENDIX
VOLUME I OF III (JA 1–JA 322)

PAMELA JO BONDI
ATTORNEY GENERAL OF
FLORIDA
ALLEN WINSOR
SOLICITOR GENERAL
CAROLYN M. SNURKOWSKI
ASSOCIATE DEPUTY
ATTORNEY GENERAL
Counsel of Record
OFFICE OF THE ATTORNEY
GENERAL
PL-01, The Capitol
Tallahassee, FL 32399-1050
(850) 414-3300
carolyn.snurkowski@
myfloridalegal.com

Counsel for Respondent

SETH P. WAXMAN
Counsel of Record
CATHERINE M.A. CARROLL
DAVID M. LEHN
FRANCESCO VALENTINI
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
seth.waxman@wilmerhale.com

Counsel for Petitioner

ADDITIONAL COUNSEL LISTED ON INSIDE COVER

PETITION FOR CERTIORARI FILED DECEMBER 3, 2014
CERTIORARI GRANTED MARCH 9, 2015

Library of Congress
Law Library

NANCY A. DANIELS
PUBLIC DEFENDER
DAVID A. DAVIS
ASSISTANT PUBLIC
DEFENDER
Leon County Courthouse
301 South Monroe Street
Suite 401
Tallahassee, FL 32301

MARK E. OLIVE
LAW OFFICES OF
MARK E. OLIVE, P.A.
320 West Jefferson Street
Tallahassee, FL 32301

Counsel for Petitioner

ERIC F. FLETCHER
ALLISON TRZOP
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109

TABLE OF CONTENTS

VOLUME I

Page

Docket Listing excerpts for the Supreme Court of Florida, Case No. SC12-1947 1

Docket Listing excerpts for the Supreme Court of Florida, Case No. SC12-345 5

Docket Listing excerpts for the Supreme Court of Florida, Case No. SC07-1798 8

Docket Listing excerpts for the Supreme Court of Florida, Case No. SC00-1042 11

Docket Listing excerpts for the Circuit Court of the First Judicial Circuit in and for Escambia County, Florida, Case No. 1998 CF 001795 A 14

Opinion of the Supreme Court of Florida, dated April 18, 2002 27

Florida Circuit Court Order Denying Defendant's Motion to Vacate Judgment of Conviction and Sentence, dated August 23, 2007 53

Opinion of the Supreme Court of Florida, dated September 17, 2009 127

Florida Circuit Court Order Denying Motion for Evidentiary Hearing for Determination of Mental Retardation of the Defendant, dated February 23, 2012, with Attachment #1 (excerpts of Order Denying Defendant's Motion to Vacate Judgment of Conviction and Sentence, dated August 23, 2007) 193

Jury Instructions, filed March 9, 2012 207

TABLE OF CONTENTS—Continued

Page

Jury Verdict, filed March 9, 2012 217

Transcript of *Spencer* Hearing, dated April 4, 2012 218

State's Memorandum of Law in Support of the Jury's Recommendation of Death, filed April 23, 2012 230

Defendant's Sentencing Memorandum in Support of Life, filed June 28, 2012 238

Sentencing Order, dated August 16, 2012 258

Florida Circuit Court Judgment and Sentence, dated August 16, 2012 272

Opinion of the Supreme Court of Florida, dated May 1, 2014 289

Supreme Court of Florida Order Denying Motion for Rehearing, dated September 4, 2014 322

VOLUME II

Transcript of Resentencing Hearing
Volume I, March 5, 2012 323
Volume II, March 6, 2012 478

VOLUME III

Transcript of Resentencing Hearing (continued)
Volume III, March 6-7, 2012 647
Volume IV, March 7-8, 2012 789
Volume V, March 9, 2012 956

APPENDICES

RELEVANT DOCKET ENTRIES

FLORIDA SUPREME COURT
NO. SC12-1947
TIMOTHY LEE HURST V. *STATE OF FLORIDA*

Date Docketed	Description	Filed By	Notes
09/06/2012	NOTICE-APPEAL (RESEN-TENCING)	AA Timothy Lee Hurst 124669 BY: TA D. Todd Doss 910384	ADDITIONAL CERTIFIED COPY REC'D 09/10/2012
		* * *	
09/14/2012	ORDER-RECORD FILING (HEARINGS/ TRIAL)		TR: 11/26/2012; ROA: 12/17/2012
		* * *	
11/13/2012	RECORD/ TRAN-SCRIPT	Hon. Ernie Lee Magaha, Clerk BY: Hon. Ernie Lee Magaha, Clerk	VOLUMES 1-9
11/13/2012	JURY VOTE		7-5 DEATH
		* * *	
03/15/2013	INITIAL BRIEF-MERITS	AA Timothy Lee Hurst 124669	

Date Docketed	Description	Filed By	Notes
		BY: AA David A. Davis 271543	
		* * *	
05/22/2013	ANSWER BRIEF-MERITS	AE State Of Florida STATE1 BY: AE Stephen Richard White 159089	W/APPENDIX (O&7)
		* * *	
07/12/2013	REPLY BRIEF-MERITS	AA Timothy Lee Hurst 124669 BY: AA David A. Davis 271543	
		* * *	
09/09/2013	ORDER-PSI (RESENTENCING)		
		* * *	
09/18/2013	PRESENTENCE INVESTIGATION		CONFIDENTIAL

Date Docketed	Description	Filed By	Notes
10/31/2013	NOTICE-SUPPLE-MENTAL AUTHORITY	AA Timothy Lee Hurst 124669 BY: AA William Carl Mclain 201170	
11/07/2013	NOTICE-SUPPLE-MENTAL AUTHORITY	AE State Of Florida STATE1 BY: AE Stephen Richard White 159089	
11/07/2013	ORAL ARGUMENT HELD		
05/01/2014	DISP-AFFIRMED		For the reasons expressed above, we affirm Hurst's sentence of death for the first-degree murder of Cynthia Harrison. It is so ordered. (RC)
05/13/2014	MOTION-REHEARING	AA Timothy Lee Hurst 124669 BY: AA William Carl Mclain 201170	

Date Docketed	Description	Filed By	Notes
05/28/2014	NOTICE-SUPPLEMENTAL AUTHORITY	AA Timothy Lee Hurst 124669 BY: AA William Carl Mclain 201170	
09/04/2014	DISP-REHEARING DY		Appellant's Motion for Rehearing is hereby denied. (RC)
	* * *		
09/22/2014	MANDATE		CC: COUNSEL
	* * *		

RELEVANT DOCKET ENTRIES

FLORIDA SUPREME COURT
NO. SC12-345
TIMOTHY LEE HURST* V. *STATE OF FLORIDA

Date Docketed	Description	Filed By	Notes
02/27/2012	PETITION-MANDAMUS	PT Timothy Lee Hurst 124669 BY: PT D. Todd Doss 910384	FILED AS "EMERGENCY PETITION FOR WRIT OF MANDAMUS AND PROHIBITION" (O&7 & REQ E-MAIL)
	* * *		
02/27/2012	APPENDIX-PETITION	PT Timothy Lee Hurst 124669 BY: PT D. Todd Doss 910384	O&7
02/27/2012	MOTION-STAY (PROCEEDINGS BELOW)	PT Timothy Lee Hurst 124669 BY: PT D. Todd Doss 910384	FILED AS "EMERGENCY MOTION TO STAY AND HOLD PROCEEDINGS BELOW IN ABEYANCE DURING PENDENCY OF PETITION FOR WRIT OF

Date Docketed	Description	Filed By	Notes
			MANDAMUS AND WRIT OF PROHIBITION"
03/02/2012	ORDER-STAY PROCEEDINGS BELOW DY		Petitioner's Emergency Motion to Stay Proceedings Below is hereby denied.
	* * *		
03/23/2012	RESPONSE	RS State Of Florida STATE1 BY: RS Stephen Richard White 159089	(WITH APPENDIX) FILED AS "RESPONSE OPPOSING EMERGENCY PETITION FOR WRIT OF MANDAMUS AND PROHIBITION" (O&7 & REQ E-MAIL)
04/19/2012	DISP-DENIED		
04/23/2012	NOTICE-DISMISS (VOLUNTARY)	PT Timothy Lee Hurst 124669 BY: PT D. Todd Doss 910384	

Date Docketed	Description	Filed By	Notes
05/02/2012	ORDER-OTHER SUBSTANTIVE DY		Petitioner's Notice of Voluntary Dismissal is hereby denied.

* * *

RELEVANT DOCKET ENTRIES

FLORIDA SUPREME COURT
NO. SC07-1798
TIMOTHY LEE HURST* V. *STATE OF FLORIDA

Date Docketed	Description	Filed By	Notes
09/24/2007	NOTICE-APPEAL (3.850-EVIDENTIARY HEARING)	AA Timothy Lee Hurst 124669 BY: WD Jeffrey M. Hazen 153060	
	* * *		
10/04/2007	ORDER-RECORD FILING (HEARINGS/TRIAL)		TR: 12/26/07; ROA: 01/15/08; EXH: 01/08/08
	* * *		
12/13/2007	RECORD/TRANSCRIPT	Hon. Ernie Lee Magaha, Clerk BY: Hon. Ernie Lee Magaha, Clerk	ROA (VOLS 1-10) & TRANSCRIPTS (VOLS 1-5)
	* * *		
12/28/2007	RECORD/TRANSCRIPT	Hon. Ernie Lee Magaha, Clerk BY: Hon. Ernie Lee Magaha,	VOLUMES 1-15

Date Docketed	Description	Filed By	Notes
		Clerk	
		* * *	
06/20/2008	INITIAL BRIEF-MERITS	AA Timothy Lee Hurst 124669 BY: WD Jeffrey M. Hazen 153060	O&7 & E-MAIL
		* * *	
09/24/2008	ANSWER BRIEF-MERITS	AE State Of Florida STATE1 BY: AE Stephen Richard White 159089	O&7 & E-MAIL
11/24/2008	REPLY BRIEF-MERITS	AA Timothy Lee Hurst 124669 BY: WD Jeffrey M. Hazen 153060	O&7 & E-MAIL
		* * *	
05/05/2009	ORAL ARGUMENT HELD		
		* * *	

Date Docketed	Description	Filed By	Notes
09/17/2009	DISP-REMANDED FOR RE-SENTENC-ING		Based on the foregoing, we affirm the trial court's order denying relief as to the guilt phase claims raised by Hurst. We reverse the trial court's order denying relief as to his penalty phase claim of ineffective assistance of counsel in investigation and presentation of mental mitigation, vacate his sentence of death, and remand for a new penalty phase proceeding before a jury, which may consider available evidence of aggravation and mitigation.
	* * *		
10/08/2009	MANDATE		CC: COUNSEL
	* * *		

RELEVANT DOCKET ENTRIES

FLORIDA SUPREME COURT
NO. SC00-1042
TIMOTHY LEE HURST* V. *STATE OF FLORIDA

Date Docketed	Description	Filed By	Notes
		* * *	
05/12/2000	NOTICE-APPEAL (INITIAL)	AA Timothy Lee Hurst 124669 BY: TA R. Glenn Arnold 324868	
		* * *	
05/15/2000	ORDER-RECORD FILING (HEARINGS/ TRIAL)		TR: 7/21/2000; ROA/EXH: 8/10/2000
08/04/2000	RECORD/ TRANSCRIPT	Hon. Ernie Lee Magaha, Clerk BY: Hon. Ernie Lee Magaha, Clerk	ROA (VOLS I-III); TRANS (VOLS I-V)
08/04/2000	JURY VOTE		11-1 Death
		* * *	
08/08/2000	EXHIBITS		2 BOXES; 1 PKG POSTERS
		* * *	
01/31/2001	INITIAL	AA Timothy	O&7 W/DISK

Date Docketed	Description	Filed By	Notes
	BRIEF-MERITS	Lee Hurst 124669 BY: AA William Carl Mclain 201170	
01/31/2001	APPENDIX	AA Timothy Lee Hurst 124669 BY: AA William Carl Mclain 201170	O&7
05/07/2001	ANSWER BRIEF-MERITS	AE State Of Florida STATE3 BY: AE Curtis M. French 291692	O&7 W/DISK
05/08/2001	ORDER-PSI		
	* * *		
06/08/2001	REPLY BRIEF-MERITS	AA Timothy Lee Hurst 124669 BY: AA William Carl Mclain 201170	O&3 W/DISK; 06/12/2001: 4 COPIES FILED
	* * *		
10/03/2001	ORAL ARGUMENT HELD		
04/18/2002	DISP-AFFIRMED		
04/25/2002	MOTION-REHEAR-	AA Timothy Lee Hurst	O&7 (RC)

Date Docketed	Description	Filed By	Notes
	ING	124669 BY: AA William Carl Mclain 201170	
06/03/2002	DISP-REHEARING DY		(RC)
06/03/2002	MANDATE		CC: ALL PARTIES
	* * *		
06/28/2002	MOTION-MANDATE RECALL	AA Timothy Lee Hurst 124669 BY: AA William Carl Mclain 201170	O&7
	* * *		
08/12/2002	USSC CERTIORARI	02-5912	& DOCKETED 08/20/2002
	* * *		
10/09/2002	ORDER-OTHER SUBSTANTIVE DY		MOT/RECALL MANDATE DY
10/21/2002	USSC DISP-CERTIORARI DY		& ORDER REC'D 10/28/2002
	* * *		

RELEVANT DOCKET ENTRIES

IN THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT
IN AND FOR ESCAMBIA COUNTY
STATE OF FLORIDA, NO. 1998 CF 001795 A
STATE OF FLORIDA* V. *HURST

No.	Date of	Pleadings Filed, Orders and Decrees
		* * *
25	05/26/98	INDICTMENT FILED
		* * *
38	06/04/98	WAIVED ARRAIG. PLED NOT GUILTY SET FOR JURY TRIAL: 090898
		* * *
44	08/14/98	FILE NOTICE OF INTENT TO SEEK THE DEATH PENALTY
		* * *
88	01/22/99	FILE MOTION TO PROHIBIT ANY REFERENCE TO THE ADVISORY ROLE OF
89	01/22/99	THE JURY AT SENTENCING
		* * *
100	01/22/99	FILE MOTION TO ELECT AND JUSTIFY AGGRAVATING CIR-CUMSTANCES
		* * *

107	01/22/99	FILE MOTION FOR STATEMENT OF PARTICULARS AS TO AG-
		GRAVATING
108	01/22/99	CIRCUMSTANCES AND TO DIS-
		MISS INDICTMENT FOR LACK
		OF NOTICE
109	01/22/99	AS TO AGGRAVATING CIRCUM-
		STANCES
		* * *
126	01/22/99	FILE MOTION TO PROHIBIT ANY
		REFERENCE TO THE ADVISORY
		ROLE OF THE
127	01/22/99	JURY SENTENCING
		* * *
137	01/22/99	FILE MOTION IN LIMINE AND
		TO STRIKE PORTION OF FLORI-
		DA STANDANRD
138	01/22/99	JURY INSTRUCTION IN CRIMI-
		NAL CASES RE: CALDWELL VS
		MISSISSIPPI
		* * *
142	01/22/99	FILE MOTION FOR STATEMENT
		OF PARTICULARS RE: AGGRA-
		VATING
143	01/22/99	CIRCUMSTANCES ,THE REASON
		THE DEATH PENALTY IS
		SOUGHT AND
144	01/22/99	THE THEORY OF PROSECUTION
		UNLYING MURDER IN THE
		FIRST DEGREE

* * *

292	03/10/00	THE FOLLOWING LIST OF MOTIONS ARE DENIED.
293	03/10/00	DEFENDANTS MOTION TO DISMISS
294	03/10/00	MOTION FOR STATEMENT OF PARTICULARS RE: AGGRAVATING CIRCUMSTANCES

* * *

296	03/10/00	DSMOTION FOR FINDING OF FACT BY THE JURY
297	03/10/00	MOTION TO PROHIBIT ANY REFERENCE TO THE ADVISORY ROLE OF THE JURY
298	03/10/00	SENTENCING

* * *

316	03/10/00	MOTION TO ELECT AND JUSTIFY AGGRACATING CIRCUMSTANCES

* * *

322	03/10/00	MOTION FOR STATEMENT OF PARTICULARS AS TO AGGRAVATING
323	03/10/00	CIRCUMSTANCES AND TO DISMISS INDICTMENT FOR LACK OF NOTICE AS TO
324	03/10/00	AGGRAVATING CIRCUMSTANCES

* * *

329	03/10/00	MOTION TO PROHIBIT ANY REFERENCE TO THE ADVISORY ROLE OF THE
330	03/10/00	JURY AT SENTENCING
		* * *
459	03/23/00	JURY VERDICT @10:20 AM
460	03/23/00	FOUND GUILTY AS CHARGED
		* * *
513	05/08/00	NOTICE OF APPEAL FILED
		* * *
671	10/16/03	MOTION FOR POST CONVICTION RELIEF FILED—FILED AS MOTION TO VACATE JUDGMENT OF CONVICTION AND SENTENCE UNDER 3.850
		* * *
684	12/02/03	FILED STATE'S RESPONSE TO MOTION TO VACATE JUDGMENT OF CONVICTION AND SENTENCE (3.850 MOTION)
		* * *
688	01/02/04	FILED REPLY TO STATES RESPONSE TO DEFENDANTS 3.850 MOTION
		* * *
701	02/23/04	HUFF HEARING HELD
		* * *

706	03/02/04	FILED ORDER DEFINING SCOPE OF EVIDENTIARY HEARING—HEARING TO BE HELD ON PART OF CLAIM I, CLAIMS II, III AND V IN ENTIRETY AND PART OF CLAIM IV
		* * *
741	06/16/04	POST CONVICTION EVIDENTIARY HEARING BEGAN BUT NOT CONCLUDED. CONTINUED TO 6-17-2004 AT 9:00AM
		* * *
747	06/17/04	EVIDENTIARY HEARING RESUMED BUT NOT CONCLUDED. COURT REQUESTED TO TAKE JUDICIAL NOTICE OF COURT FILE ON LEE SMITH, JR. DEFENSE MAKES BRADY CLAIM ON EXHIBIT 14B—HANDWRITTEN FILE NOTES OF INVESTIGATOR B. NESMITH. COURT SEALED FILE WITH DIRECTIONS THAT ONLY HIGHER COURT TO REVIEW THEM. DEFENSE WITNESS C. HESS (IN JASPER, ALABAMA) TO BE ISSUED SUBPOENA OR CERTIFICATE OF MATERIALITY BY DEFENSE. STATUS CONFERENCE SET FOR 7-2-2004 AT 11:00AM ON WITNESS AVAILABILITY. EVIDENTIARY HEARING TO BE HELD OPEN FOR TESTIMONY OF HESS AND DAVID KLADITIS

ON 7-7-2004 AT NOON AND FOR CLOSING ARGUMENT. EVIDENTIARY HEARING CONTINUTED TO 6-18-2004 AT 9:15AM.

* * *

753 06/18/04 EVIDENTIARY HEARING RESUMED. TESTIMONY OF OTHER WITNESSES AND CLOSING ARGUMENTS SET FOR 7-7-2004 AT NOON. DEFENSE RENEWS BRADY CLAIM ON EXHIBIT 14B. COURT DIRECTS CLERK TO MAKE COPY OF FILE NOTES FOR STATE ATTORNEY TO INSPECT. ORIGINAL NOTES TO BE SEALED AND KEPT IN COURT FILE. STATE TO GIVE RESULTS OF INSPECTIONS RE: BRADY CLAIM BY 7-2-2004 STATUS CONFERENCE HEARING. COURT ADVISES COURT REPORTER MAY BEGIN TO PREPARE TRANSCRIPT OF HEARING.

* * *

769 07/09/04 EVIDENTIARY HEARING RESUMED FOR THE TESTIMONY OF 2 WITNESSES (DAVID KLADITIS AND CARL HESS). DEFENSE MAY FILE AMENDED MOTION FOR POST CONVICTION RELEIF BY 10-1-2004 AND STATE'S RESPONSE TO BE FILED BY 11-1-2004

* * *

782	09/30/04	FILED SUPPLEMENTAL MOTION TO VACATE JUDGMENT OF CONVICTION AND SENTENCE.
783	10/21/04	FILED STATE'S RESPONSE TO SUPPLEMENTAL MOTION TO VACATE JUDGMENT OF CONVICTION AND SENTENCE

* * *

787	12/06/04	FILED SUPPLEMENT TO STATES RESPONSE TO MOTION TO VACATE JUDGMENT OF CONVICTION AND SENTENCE

* * *

790	01/03/05	FILED DEFENDANTS REPLY TO STATE'S RESPONSE TO DEFENDANT'S SUPPLEMENTAL RULE 3.850/3.851 MOTION

* * *

802	02/07/05	FILED TRANSCRIPT OF EVIDENTIARY HEARING HELD 7-9-2004 AND JUNE 16TH, 17TH AND 18TH, 2004 (5 VOLUMES)

* * *

826	05/23/05	FILED THIRD SUPPLEMENTAL MOTION TO VACATE JUDGMENT OF CONVICTION AND SENTENCE

* * *

830	08/17/05	FILED ORDER DENYING AN EVIDENTIARY HEARING ON DEFENDANT'S FIRST AND SECOND SUPPLMENTAL MOTIONS WITHOUT PREJUDICE
		* * *
842	09/29/05	FOURTH SUPPLEMENTAL MOTION TO VACATE JUDGMENT OF CONVICTION AND SENTENCE FILED
843	10/05/05	FILED STATES RESPONSE TO FOURTH SUPPLEMENTAL MOTION TO VACATE JUDGMENT OF CONVICTION AND SENTENCE
		* * *
864	01/20/06	HUFF HEARING HELD ON 3RD AND 4TH SUPPLEMENTAL POST CONVICTION MOTIONS. EVIDENTIARY HEARING GRANTED AT TO THE 3RD SUPPLEMENTAL MOTION AND DENIED AS TO THE 4TH SUPPLEMENTAL MOTION. EVIDENTIARY SET FOR 3-10-2006 AT 2:00 PM.
		* * *
867	02/02/06	FILED ORDER DEFINING SCOPE OF EVIDENTIARY HEARING AND SETTING HEARING FOR 3-10-2006 AT 2:00PM. STATUS CONFERENCE SCHEDULED FOR 2-10-2006 AT 12:30PM.
		* * *

905	02/28/07	FILED ORDER DENYING DEFENDANT'S WRITTEN PROFFER OF EVIDENCE PROPOSED TO BE SUBMITTED IN SUPPORT OF 3RD SUPPLEMENTAL MOTION FOR POST CONVICTION RELIEF AND
906	02/28/07	ORDER VACATING AND SETTING ASIDE ORDER GRANTING EVIDENTIARY HEARING ON 3RD SUPPLEMENTAL MOTION TO VACATE JUDGMENT AND SENTENCE AND ORDER SETTING CLOSING ARGUMENTS

* * *

911	05/23/07	FILED DEFENDANT'S CLOSING ARGUMENT
912	06/29/07	FILED STATE'S CLOSING ARGUMENT
913	07/23/07	DEFENDANT'S REPLY TO STATE'S CLOSING ARGUMENT
914	08/23/07	FILED ORDER DENYING DEFENDANT'S MOTION TO VACATE JUDGMENT OF CONVICTION AND SENTENCE UNDER 3.851 WITH ATTACHMENTS
915	09/19/07	NOTICE OF APPEAL FILED ON POST CONVICTION ORDER TO SUPREME COURT

* * *

932	11/09/07	FILED TRANSCRIPT OF PROCEEDINGS HELD 1-20-2006

933	11/09/07	FILED TRANSCRIPT OF PROCEEDINGS HELD 2-23-2004
		* * *
940	11/28/07	FILED TRANSCRIPT OF PROCEEDINGS HELD 7-9-2004
		* * *
1111	02/22/12	STATE OF FLORIDA'S RESPONSE TO MOTION TO DECLARE DEFENDANT'S MENTAL RETARDATION AS A BAR TO EXECUTION AND REQUEST FOR HEARING WITH EXHIBIT 1 AND 2
		* * *
1117	02/23/12	HEARING HELD ON DEFENSE MOTION FOR HEARING ON MENTAL RETARDATION—DENIED
		* * *
1120	02/24/12	MOTION FILED TO DECLARE DEFENDANT'S MENTAL RETARDATION AS A BAR TO EXECUTION AND REQUEST FOR HEARING FILED BY ATTY D. TODD DOSS
1121	02/24/12	CORRESPONDENCE FILED FROM JUDGE NOBLES, DENYING MOTION FOR EVIDENTIARY HEARING
		* * *

1124	02/24/12	ORDER DENYING MOTION FOR EVIDENTIARY HEARING FOR DETERMINATION OF MENTAL RETARDATION OF THE DEFENDANT
		* * *
1128	02/27/12	REPLY TO THE STATE OF FLORIDA'S RESPONSE TO MOTION TO DECLARE DEFENDANT'S MENTAL RETARDATION AS A BAR TO EXECUTION AND REQUEST FOR HEARING
		* * *
1144	03/06/12	JURY TRIAL BEGAN, BUT NOT CONCLUDED
		* * *
1149	03/07/12	JURY TRIAL RESUMED, BUT NOT CONCLUDED
		* * *
1158	03/08/12	JURY TRIAL RESUMED BUT NOT CONCLUDED
		* * *
1165	03/09/12	JURY TRIAL RESUMED & CONCLUDED (PENALTY PHASE RETRIAL)
		* * *
1168	03/09/12	JURY DELIBERATED FROM 10:50 AM UNTIL 12:45 PM
1169	03/09/12	JURY QUESTION @ 12:10 PM, FILED

1170	03/09/12	FILED—ADVISORY SENTENCE: DEATH 7 TO 5
1171	03/09/12	JURORS POLLED BY CLERK

* * *

1175	03/09/12	MOTION TO DISMISS FOR FAILURE TO COMPLY WITH RING V. ARIZONA OR, IN THE ALTERNATIVE FOR INTERROGATORY VERDICT, FILED

* * *

1177	03/09/12	JURY INSTRUCTIONS FILED—7.11 PENALTY PROCEEDINGS—CAPITAL CASES FINAL INSTRUCTIONS
1178	03/09/12	JURY TRIAL WORKSHEET FILED

* * *

1185	04/04/12	SPENCER HEARING HELD
1186	04/04/12	SENTENCING MEMORANDUM TO BE SUBMITTED BY THE STATE AND DEFENSE

* * *

1189	04/19/12	TRANSCRIPTS OF PROCEEDINGS HELD ON 5TH, 6TH, 7TH, 8TH, & 9TH OF MARCH, 2012 FILED
1190	04/23/12	FILED STATES MEMORANDUM OF LAW IN SUPPORT OF THE JURY'S RECOMMENDATION OF DEATH

* * *

1201	06/28/12	SENTENCING MEMORANDUM IN SUPPORT OF LIFE FILED BY: D. TODD DOSS, ESQUIRE
		* * *
1204	08/16/12	FINAL JUDGMENT FOR FINE & COST PREPARED AND SENT TO JUDGE FOR SIGNATURE
		FELONY Final Judgement for Charges <LASER> Sent on: 08/16/2012 14:37:18
		* * *
1210	08/16/12	DEATH PENALTY SENTENCING
1211	08/16/12	STATE PRISON—SENTENCED TO DEATH
1212	08/16/12	WITH CREDIT FOR 1 YEAR PLUS 358 DAYS PLUS ALL TIME PREVIOUSLY SERVED IN DOC
		* * *
1217	08/16/12	SENTENCING ORDER FILED
1218	08/16/12	APPEAL FILED IN OPEN COURT —PUBLIC DEFENDER APPOINTED FOR PURPOSE OF APPEAL
		* * *
1226	09/24/12	FILE TRANSCRIPT OF PROCEEDINGS HELD: APRIL 4, 2012
		* * *
1234	10/11/12	FILE TRANSCRIPT OF PROCEEDINGS HELD: FEBRUARY 23, 2012

SUPREME COURT OF FLORIDA

TIMOTHY LEE HURST,
Appellant,

v.

STATE OF FLORIDA,
Appellee,

No. SC00-1042
April 18, 2002
Rehearing Denied June 3, 2002
[819 So. 2d 689]

PER CURIAM.

We have on appeal the judgment and sentence of the trial court imposing a sentence of death upon Timothy Lee Hurst. We have jurisdiction. *See* art. V, § 3(b)(1), Fla. Const. For the following reasons, we affirm Hurst's conviction for first-degree murder and his sentence of death.

MATERIAL FACTS

The trial record reflects the underlying relevant facts giving rise to Hurst's conviction and sentence. On the morning of May 2, 1998, a murder and robbery occurred at a Popeye's Fried Chicken restaurant in Escambia County, Florida, where Hurst was employed. Hurst and the victim, assistant manager Cynthia Lee Harrison, were scheduled to work at 8 a.m. on the day of the murder. A worker at a nearby restaurant, Carl Hess, testified that he saw Harrison arriving at work between 7 a.m. and 8:30 a.m. Afterwards, Hess said that he saw a man, who was about six feet tall and

weighed between 280 and 300 pounds, arrive at Popeye's and bang on the glass windows until he was let inside. The man was dressed in a Popeye's uniform and Hess recognized him as someone he had seen working at Popeye's. Shortly after the crime, Hess picked Hurst from a photographic lineup as the man he had seen banging on the windows. Hess was also able to identify Hurst at trial.

On the morning of the murder, a Popeye's delivery truck was making the rounds at Popeye's restaurants in the area. Janet Pugh, who worked at another Popeye's, testified she telephoned Harrison at 7:55 a.m. to tell her that the delivery truck had just left and Harrison should expect the truck soon. Pugh spoke to the victim for four to five minutes and did not detect that there was anything wrong or hear anyone in the background. Pugh was certain of the time because she looked at the clock while on the phone.

Popeye's was scheduled to open at 10:30 a.m. but Harrison and Hurst were the only employees scheduled to work at 8 a.m.[1] However, at some point before opening, two other Popeye's employees arrived, in addition to the driver of the supply truck. None of them saw Hurst or his car. At 10:30 a.m., another Popeye's assistant manager, Tonya Crenshaw, arrived and found the two Popeye's employees and the truck driver waiting outside the locked restaurant.

When Crenshaw unlocked the door, and she and the delivery driver entered, they discovered that the safe was unlocked and open, and the previous day's receipts, as well as $375 in small bills and change, were

---

[1] Before 10:30, the doors would have remained locked, causing the State to develop the theory that the victim must have known her killer and trusted the person enough to open the locked door.

missing. The driver discovered the victim's dead body inside the freezer. The victim had her hands bound behind her back with black electrical tape and she also had tape over her mouth. Similar tape was later found in the trunk of Hurst's car. The scene was covered with a significant amount of the victim's blood, and it was apparent from water on the floor that someone had attempted to clean up the area.

The victim suffered a minimum of sixty incised slash and stab wounds, including severe wounds to the face, neck, back, torso, and arms. The victim also had blood stains on the knees of her pants, indicating that she had been kneeling in her blood. A forensic pathologist, Dr. Michael Berkland, testified that some of the wounds cut through the tissue into the underlying bone, and while several wounds had the potential to be fatal, the victim probably would not have survived more than fifteen minutes after the wounds were inflicted. Dr. Berkland also testified that the victim's wounds were consistent with the use of a box cutter. A box cutter was found on a baker's rack close to the victim's body. Later testing showed that the box cutter had the victim's blood on it. It was not the type of box cutter that was used at Popeye's, but was similar to a box cutter that Hurst had been seen with several days before the crime.

Hurst's friend, Michael Williams, testified that Hurst admitted to him that he had killed Harrison. Hurst told him that he had an argument with the victim, she "retaliated," and that Hurst hit the victim and cut her with a box cutter. Hurst said he had killed the victim because, "he didn't want the woman to see his face." Williams stated that Hurst had talked about robbing Popeye's on previous occasions.

Another of Hurst's friends, "Lee-Lee" Smith, testified that the night before the murder, Hurst said he was going to rob Popeye's. On the morning of the murder, Hurst came to Smith's house with a plastic container full of money from the Popeye's safe. Hurst instructed Smith to keep the money for him. Hurst said he had killed the victim and put her in the freezer. Smith washed Hurst's pants, which had blood on them, and threw away Hurst's socks and shoes. Later that morning, Smith and Hurst went to Wal-Mart to purchase a new pair of shoes.[2] They also went to a pawn shop where Hurst saw some rings he liked, and after returning to Smith's house for the stolen money, Hurst returned to the shop and purchased the three rings for $300. An employee at the shop, Bob Little, testified that on the day of the murder, a man fitting Hurst's description purchased three rings. Little picked Hurst out of a photographic lineup as the man who had purchased the rings. The police recovered the three rings from Hurst.

Smith's parents were out of town the weekend of the murder but upon their return, and after discovering the container with the money from Popeye's in Smith's room, Smith's mother contacted the police and turned the container over to them. The police interviewed Smith and searched a garbage can in Smith's yard where they found a coin purse that contained the victim's driver's license and other property, a bank bag marked with "Popeye's" and the victim's name, a bank

---

[2] The Wal-Mart accounting office manager and records custodian, Deborah McKnight, testified that on May 2, 1998, a pair of LA Gear white and navy shoes were purchased at 10:10 a.m. and no other shoes of this type were purchased on the day of the murder. The police found a pair of LA Gear shoes in Hurst's car with the Wal-Mart sales ticket on them.

deposit slip, a sock with blood stains on it, and a sheet of notebook paper marked "Lee Smith, language lab." On the back of the notebook paper someone had added several numbers, and one number was the same as the amount on the deposit slip. Smith's father also gave the police a pair of size fourteen shoes that appeared to have blood stains on them and that he had retrieved from the same trash can.

Jack Remus, a Florida Department of Law Enforcement (FDLE) crime lab analyst, testified that the shoes were tested with phenolpthalein to detect blood, and while the test results exhibited some of the chemical indications associated with blood, attempts at DNA testing were not successful. Remus also tested the blood-stained sock and determined that the DNA typing was consistent with the victim. Hurst's pants were also tested, but no blood evidence was detected. FDLE fingerprint expert Paul Norkus testified that the deposit slip in the garbage can had three of Hurst's fingerprints on it.

At trial, the State played the tape of an interview the police had conducted with Hurst shortly after the murder. Hurst said that on the morning of the murder he was on his way to work and his car broke down. He said that he telephoned Harrison at Popeye's to say he was unable to come to work, and when he talked to her, she sounded scared and he heard whispering in the background. Hurst then went to Smith's house and changed out of his work clothes. Hurst said he went to the pawn shop and bought necklaces for friends, but he did not mention purchasing the three rings or buying a new pair of shoes at Wal-Mart.

At the close of the guilt phase of the trial, the jury deliberated for approximately six hours before finding

Hurst guilty of first-degree murder. During the penalty phase, several of Hurst's family members testified that Hurst was slow and that his emotional and mental development was not as advanced as other people his age. After the completion of penalty phase testimony, the court instructed the jury on two aggravating circumstances and on a number of mitigating circumstances. The jury voted eleven-to-one to recommend the death penalty.

The trial court sentenced Hurst to death, and found three aggravating circumstances: (1) the murder was committed by a person engaged in the commission of a robbery ("great weight"); (2) the murder was especially heinous, atrocious, and cruel (HAC) ("great weight"); and (3) the murder was committed for the purpose of avoiding or preventing a lawful arrest ("great weight"). The avoid arrest aggravating circumstance was not argued by the State and no instruction on that aggravator was read to the jury. In mitigation, the court considered a number of claimed mitigating factors and rejected most, including four determinations which Hurst now challenges:[3] (1) Hurst has a good family background ("no weight"); (2) Hurst's contribution to the community was good in that he assisted his church and assisted his neighbors during their time of need ("little

---

[3] Hurst does not challenge six of the trial court's sentencing order decisions on mitigating factors, including: (1) Hurst acted under the substantial dominion of another person, Lee-Lee Smith ("no weight"); (2) Hurst's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired ("little weight"); (3) Hurst exhibited good conduct through every phase of the trial ("little weight"); (4) Hurst has no prior criminal history ("moderate weight"); (5) lack of future dangerousness ("no weight"); (6) Hurst assisted his mother and father around the home and took care of and protected his younger siblings ("moderate weight").

weight"); (3) Hurst maintained regular church attendance and involved himself in weekly Bible study ("little weight"); (4) Hurst's age ("very little weight").[4]

ANALYSIS

Hurst raises four issues in his appeal, all of which pertain to the penalty phase of his trial.[5] Despite the lack of challenge, we have examined the record and have determined that there was competent and substantial evidence presented to support the conviction for murder. We have already referred to that evidence in some detail.[6]

"Avoid Arrest" Aggravating Circumstance

Hurst does not challenge the aggravating factors found by the trial court that the murder was especially heinous, atrocious, or cruel (HAC), or that the murder took place during the course of a robbery. However, Hurst does challenge the trial court's finding of the statutory "avoid arrest" aggravating factor. *See* § 921.141(5)(e), Fla. Stat. (2000). Hurst first challenges

---

[4] There are discrepancies in the record as to whether Hurst was eighteen or nineteen when the murder was committed.

[5] These issues include: (1) the trial court erred in finding the avoid arrest aggravating circumstance because it was never presented to the jury or judge via argument or instruction and because the evidence does not support the existence of the factor; (2) the court failed to properly consider and weigh the statutory and nonstatutory mitigating circumstances; (3) the death sentence is disproportionate; and (4) imposition of the death sentence in the absence of notice of the aggravating circumstances to be considered or of jury findings on the aggravating circumstances and death eligibility violates due process and the protection against cruel and unusual punishment.

[6] *See* supra pp. 1-7.

this finding on the basis that the State did not request this aggravator and the jury was not instructed on this aggravator. We do not reach this challenge because we hold that the evidence does not support the avoid arrest aggravator, but the trial court's error in finding this aggravator was harmless as to the sentence actually imposed upon Hurst.

This Court stated in *Willacy v. State*, 696 So.2d 693 (Fla.1997), that:

> [I]t is not this Court's function to re-weigh the evidence to determine whether the State proved each aggravating circumstance beyond a reasonable doubt—that is the trial court's job. Rather, our task on appeal is to review the record to determine whether the trial court applied the right rule of law for each aggravating circumstance and, if so, whether competent substantial evidence supports its finding.

Id. at 695 (footnotes omitted). In order to establish that the murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody, the evidence must prove beyond a reasonable doubt that the sole or dominant motive for the killing was to eliminate a witness. *See Zack v. State*, 753 So.2d 9, 20 (Fla.2000). In *Riley v. State*, 366 So.2d 19, 22 (Fla.1978), this Court held that the avoid arrest aggravator could apply to the murder of a witness to a crime in addition to law enforcement personnel. However, this Court cautioned that "the mere fact of a death is not enough to invoke this factor when the victim is not a law enforcement official. Proof of the requisite intent to avoid arrest and detection must be very strong in these cases." *Id.* at 22. In the instant case, there is no competent, substantial evidence to

prove that Hurst's dominant motive for the murder was the elimination of a witness.

While the evidence reflects that Hurst may have had numerous motives for committing the murder, there is no proof indicating that Hurst's dominant motive was to avoid arrest. The trial court found the avoid arrest aggravator based on the defendant's relationship with the victim and the belief that the robbery could have been successfully completed without committing the murder. However, this Court has stated that "the mere fact that the victim knew and could identify defendant, without more, is insufficient to prove this aggravator." *Consalvo v. State*, 697 So.2d 805, 819 (Fla.1996).

The State asserts that Hurst's intent to avoid arrest is shown by Hurst's statement after the murder that he had not wanted the victim to "see his face." This statement does not indicate that Hurst's dominant motive was witness elimination. In similar cases where this Court upheld the finding of the avoid arrest aggravator, statements from the defendants clearly implied a dominant motive for witness elimination. *See Jennings v. State*, 718 So.2d 144, 151 (Fla.1998) ("[T]here was further evidence presented that Jennings ... stated that if he ever committed a robbery, he would not leave any witnesses."); *see also Looney v. State*, 803 So.2d 656, 677 (Fla.2001) (finding avoid arrest aggravator when direct testimony indicated that defendants stated "we can't have no witness to all this stuff ... so we're going to have to do this here." (omission in original)); *Lopez v. State*, 536 So.2d 226, 230 (Fla.1988) ("Lopez later told one of his accomplices ... that he had to shoot the victims because they could not afford to leave any witnesses behind.").

In the instant case, the same witness who testified that Hurst did not want the victim to "see his face" testified that Hurst told the witness after the murder that "[Hurst] had an argument with [the victim] and she retaliated. He hit her. Then he cut her." Thus, the evidence supports the finding that there were several possible motives for this murder, but does not support a finding that Hurst's dominant motive was avoiding arrest. *Cf. Connor v. State*, 803 So.2d 598, 610 (Fla.2001) (finding avoid arrest aggravator was not supported by competent, substantial evidence where evidence reflected it was entirely plausible that witness elimination had nothing to do with murder). The trial court therefore erred in finding the avoid arrest aggravator.

However, despite our finding that the trial court erred in finding the avoid arrest aggravator, we conclude that the error was harmless to Hurst. Eliminating this aggravating factor does not affect the death sentence in light of the two remaining aggravating factors weighed against the relatively weak mitigation. While the trial court gave the HAC and committed during the course of the robbery aggravators great weight, none of the mitigating circumstances considered by the trial court were given great weight. Striking the avoid arrest aggravator does not change the facts that were considered by the trial court in sentencing Hurst. Moreover, the jury recommended death by a vote of eleven to one after being instructed on only the two remaining aggravating factors. Since the jury was not instructed on this aggravator and the State did not argue the aggravator to the jury, it is obvious that Hurst was not disadvantaged in the jury's recommendation by this aggravator. *See Hoffman v. State*, 474 So.2d 1178, 1182 (Fla.1985). Thus we find beyond a reasonable doubt that striking this aggravating factor would not

change the trial court's decision to sentence Hurst to death. *See State v. DiGuilio*, 491 So.2d 1129, 1135 (Fla.1986); *Ferguson v. Singletary*, 632 So.2d 53, 58 (Fla.1993) (noting that this Court has "made it clear that a death sentence may be affirmed where an aggravating circumstance is stricken as long as the Court is convinced that the error was harmless"). Accordingly, we find no basis for relief.

MITIGATION

In his second claim, Hurst argues that the trial court erred by failing to assign sufficient mitigation weight to Hurst's age at the time of the crime, his contribution to the community, and his religious activities. Hurst also challenges the trial court's decision rejecting his "good family background" as nonstatutory mitigation.

We have previously noted that a trial court's written order must carefully evaluate each mitigating circumstance offered by the defendant, decide if it has been established, and assign it a proper weight. *See Campbell v. State*, 571 So.2d 415, 419 (Fla.1990). A trial court "must find as a mitigating circumstance each proposed factor that is mitigating in nature and has been reasonably established by the greater weight of the evidence." *Id.* (footnote omitted). Determining whether a mitigating circumstance exists and the weight to be given to existing mitigating circumstances are matters within the discretion of the sentencing court. *See Campbell v. State*, 571 So.2d at 420. A trial court may reject a claim that a mitigating circumstance has been proven provided that the record contains competent, substantial evidence to support the rejection. *See Mansfield v. State*, 758 So.2d 636, 646 (Fla.2000); *Ferrell v. State*, 653 So.2d 367, 371 (Fla.1995). Further-

more, the trial court's conclusions as to the weight of mitigating circumstances will be sustained by this Court if the conclusions are supported by sufficient evidence in the record. *See Mansfield*, 758 So.2d at 646; *Ferrell*, 653 So.2d at 371.

Age

In the instant case, the trial judge found Hurst's age to be a mitigating circumstance, but assigned it very little weight. In considering age as a mitigating circumstance in Hurst's case, the trial court found the following in its sentencing order:

> The Defendant was eighteen years of age when he murdered the victim. The defendant was legally an adult and he owned his own car and was employed. Under these circumstances, the Defendant's age should not be considered as a mitigating factor and to this the Court will give very little weight.

In considering a defendant's age, we have held that the death penalty is cruel or unusual punishment violative of the Florida Constitution when it is imposed on a defendant who was less than seventeen when committing the crime. *See Brennan v. State*, 754 So.2d 1, 7 (Fla.1999); *see also Allen v. State*, 636 So.2d 494, 497 (Fla.1994) (death penalty may not be applied to one under sixteen).[7] However, where the defendant is not a

---

[7] In *Urbin v. State*, 714 So.2d 411, 418 (Fla. 1998), we explained:

> In *Allen v. State*, 636 So.2d 494, 497 (Fla.1994), we held that the death penalty was either "cruel or unusual if imposed upon one who was under the age of sixteen when committing the crime; and death thus is prohibited by article I, section 17 of the Florida Constitution." Here the defendant is seventeen, below the age of majority, although

minor, i.e., under eighteen, "no per se rule exists which pinpoints a particular age as an automatic circumstance in mitigation. Instead, the trial judge is to evaluate the defendant's age based on the evidence adduced at trial and at the sentencing hearing." *Shellito v. State*, 701 So.2d 837, 843 (Fla.1997) (citation omitted) (citing *Peek v. State*, 395 So.2d 492, 498 (Fla.1980)).

For a court to give a non-minor defendant's age significant weight as a mitigating circumstance, the defendant's age must be linked with some other characteristic of the defendant or the crime, such as significant emotional immaturity or mental problems. *See Mahn v. State*, 714 So.2d 391, 400 (Fla.1998) (holding that age was a mitigating circumstance where defendant's long history of substance abuse, mental and emotional instability, and passivity in the face of mental and physical abuse provided the essential link between defendant's age and immaturity).[8]

---

above the constitutional line for the death penalty. However, considering that it is the patent lack of maturity and responsible judgment that underlies the mitigation of young age, *Livingston [v. State*, 565 So.2d 1288 (Fla.1988)], the closer the defendant is to the age where the death penalty is constitutionally barred, the weightier this statutory mitigator becomes. This is especially true when there is extensive evidence of parental neglect and abuse that played a significant role in the child's lack of maturity and responsible judgment.

[8] In *Mahn* we explained:

However, the record shows that Mahn was far from a normal nineteen-year old boy at the time of the killings. Rather, Mahn had an extensive, ongoing, and unrebutted history of drug and alcohol abuse, coupled with lifelong mental and emotional instability. Mahn's unrefuted, long-term substance abuse, chronic mental and emotional instability, and extreme passivity in the face of unremitting physical and

As noted above, there is some confusion in the record as to Hurst's actual age at the time of the crime, but it appears that he was at least eighteen, and thus was chronologically and legally above the age of a minor. He also worked and had his own car. Further, although members of Hurst's family testified that he was slow and emotionally immature, there was testimony that Hurst's performance in school was adequate and that he helped with taking care of the younger children in the family. The only testimony about his mental and emotional development came from his family. The limited evidence presented regarding Hurst's age does not rise to the level of the substantial evidence of a defendant's mental and emotional problems we have seen in other cases such as *Mahn v. State*, where we have concluded that defendants with a chronological age similar to Hurst were entitled to age as a significant mitigating circumstance.[9]

While the trial court's findings as to the age mitigating circumstance were rather sparse, we note the trial court also commented on Hurst's alleged emotional and maturity level limitations when it discussed other mitigating circumstances in the sentencing order. In analyzing the statutory mitigating circumstance re-

---

mental abuse provided the essential link between his youthful age and immaturity which should have been considered a mitigating factor in this case. *Cf. Campbell v. State*, 679 So.2d 720, 725-26 (Fla.1996) (finding trial court erred in not giving requested jury instruction on age as a mitigating circumstance when expert psychological testimony linked defendant's age of twenty-one with his "significant emotional immaturity"). Therefore, we find that the trial court abused its discretion in rejecting Mahn's age as a statutory mitigating circumstance.

[9] *See supra* note 8.

garding Hurst's capacity to appreciate the criminality of his conduct, the trial court noted that there was no testimony presented by the defense from mental health experts. The trial court also noted that Hurst's mother testified that Hurst did not have any psychiatric problems and that Hurst made average grades in school. Given the lack of significant evidence presented to demonstrate Hurst's particular immaturity or mental problems, we find the trial court did not abuse its discretion in assigning Hurst's age "very little weight" as a mitigating circumstance.

Family Background

Hurst also challenges the trial court's decision to reject "good family background" as a mitigating circumstance and its assignment of "no weight." As to Hurst's family background as a mitigating circumstance, the trial court found:

> The fact that the Defendant may have a good family background is not a mitigating factor that should be considered by this Court and to this the Court will give no weight.

It is unclear how much weight a "good family background" should be given as a mitigating circumstance. However, cases where significant weight has been assigned to previous family history have usually involved situations where the defendant asserted that he had a troubled background with a family history of instability, poverty, or abuse. *See, e.g., Parker v. State*, 643 So.2d 1032, 1035 (Fla.1994); *Besaraba v. State*, 656 So.2d 441, 446 (Fla.1995). The limited testimony from Hurst's family members tended to show that Hurst was a good student, was nonviolent, and had good relationships with family members. This uncontroverted evi-

dence may have been enough to establish the existence of a "good family background" in this case and entitle Hurst to some weight mitigating against the death sentence. *See, e.g., Torres-Arboleda v. Dugger*, 636 So.2d 1321, 1325 (Fla.1994) (holding that evidence of family background and personal history, such as the fact that defendant was a good student and child, and that defendant supported his family after his father's death, was evidence that could be considered in mitigation). Thus, to the extent that the trial court's sentencing order can be read as completely rejecting the possibility of good family background as a mitigating circumstance, we hold that the trial court erred.

However, we would also note that the trial court's sentencing order reflected that the court considered Hurst's assistance around the house, his attendance at church and Bible study, and his contribution to the community, each of which could be evidence of Hurst's "good family background." Furthermore, when we review the findings of aggravation and mitigation in toto, we conclude that even if the trial court erred in assigning no weight to Hurst's "good family background," any error is harmless given the severity of the aggravating circumstances in this case.

Contribution to Community and Church Attendance

Finally, Hurst argues that the trial judge erred in assigning little weight to both Hurst's contribution to his community and to his regular attendance at church.[10] Hurst claims the trial judge improperly min-

---

[10] In the sentencing order, the court wrote:

> 6. The Defendant's contribution to the community was good in that he assisted his church and he assisted his neighbors during their time of need.

imized the weight of mitigation associated with Hurst's contributions to the community and his religious activities. Hurst notes that the State did not rebut any of the evidence presented and the court did not give any reason that Hurst's family members were not credible. Hurst also cites to this Court's opinion in *Nibert v. State*, 574 So.2d 1059 (Fla.1990), for the proposition that a trial court is not free to reject, without reason, unrefuted testimony regarding mitigating evidence.

In *Nibert* this Court found that the trial court erred when it found "possible" mitigation where the defendant had undergone years of physical and psychological abuse as a child, but then dismissed the mitigation because the defendant was now an adult. *Nibert*, 574 So.2d at 1062. We rejected this analysis as inapposite because "[t]he fact that a defendant had suffered through more than a decade of psychological abuse during the defendant's formative childhood and adolescent years is in no way diminished by the fact that the abuse finally came to an end." *Id.*

The only evidence offered by the Defendant in support of this factor was the testimony of Defendant's parents and sister. No one else from the community or the church testified. Accordingly, this Court is of the opinion that this mitigating factor has not been established to any appreciable degree and to this factor the Court will give little weight.

7. The Defendant maintained regular church attendance and involved himself in weekly Bible study.

Again, only Defendant's family members testified as to this factor. There was no corroborating evidence from the pastor of Defendant's church or the Bible teacher. Accordingly, this Court is of the opinion that this mitigating factor has not been established to any appreciable degree and to this factor the Court will give little weight.

However, in the instant case, the trial court found that Hurst's religious activities and community service provided some mitigation, but that the evidence did not establish either mitigating circumstance to any appreciable degree and, thus, the court gave each mitigating circumstance little weight. Further, even though the State did not rebut Hurst's family members' testimony, it is still within the trial court's discretion to assign the appropriate amount of weight to this circumstance. *Banks v. State*, 700 So.2d 363, 368 (Fla. 1997) (holding that trial court did not abuse its discretion in rejecting defendant's religious activities as mitigating). The trial court's conclusions as to the weight of mitigating circumstances will be sustained by this Court if the conclusions are supported by sufficient evidence in the record. *Campbell*, 571 So.2d at 420.

In fact, even the testimony of Hurst's family members was limited as to his religious activities and contribution to the community. Only Hurst's parents provided testimony as to these mitigating circumstances, and as to Hurst's contribution to the community, there was no elaboration as to what his contribution was or how Hurst helped out in the neighborhood. Clearly, the instant case can be distinguished from a case where a number of nonfamilial community or church members provide extensive testimony on the defendant's behalf.

Under the circumstances presented, we find no error in the trial court's decision assigning little weight to these two non-statutory mitigating factors.

PROPORTIONALITY

Due to the uniqueness and finality of death, this Court addresses the propriety of all death sentences in a proportionality review. *See Porter v. State*, 564 So.2d

1060, 1064 (Fla.1990). In conducting this review, this Court considers the totality of the circumstances in a case as compared to other cases in which the death penalty has been imposed, thereby providing for uniformity in the application of the death penalty. *See Urbin v. State*, 714 So.2d 411, 416-17 (Fla.1998); *Porter v. State*, 564 So.2d at 1064. The death penalty is reserved for only the most aggravated and the least mitigated of first-degree murders. *See Urbin*, 714 So.2d at 416; *State v. Dixon*, 283 So.2d 1, 7 (Fla.1973).

In his argument regarding proportionality, Hurst cites a large number of cases where the Court has found that the death sentence was disproportionate. However, Hurst's case and these cases are distinguishable, because the cases he cites have either more significant mitigation or less egregious aggravating circumstances.

For example, Hurst relies in particular on *Snipes v. State*, 733 So.2d 1000 (Fla.1999), *Urbin v. State*, 714 So.2d 411 (Fla.1998), and *Williams v. State*, 707 So.2d 683 (Fla.1998), as comparable cases. In *Snipes*, the defendant killed in a murder-for-hire situation. *See Snipes*, 733 So.2d at 1002. Even though the cold, calculated, and premeditated and pecuniary gain aggravating circumstances existed, the Court found that the death penalty was disproportionate based on the large amount of substantial mitigation.[11] In *Urbin*, this

---

[11] Specifically, the defendant was seventeen when the crime was committed; he was sexually abused for a number of years as a child; he abused drugs and alcohol beginning at a young age; he was raised in a dysfunctional, alcoholic family, and suffered from childhood trauma; he had many positive personality traits (potential for rehabilitation, obtained his GED, had "sweet and loving" character, and participated in drug rehabilitation); he suffered from emotional stress and a personality disorder; he voluntarily

Court also found that the defendant's death sentence was disproportionate based on the aggravation and mitigation. *See Urbin*, 714 So.2d at 418. In aggravation, the defendant had the previous violent felony and felony murder aggravating circumstances. *Id.* at 415 n. 2. The Court struck the trial court's finding of the avoid arrest aggravating circumstance. *Id.* at 417. As in *Snipes*, there was a large amount of substantial mitigation.[12] Finally, in *Williams*, after the Court struck the "under sentence of imprisonment" aggravating circumstance, the defendant was left with only the pecuniary gain aggravating circumstance and there was a moderate amount of mitigation: age; exemplary prisoner while waiting for trial; possibility of rehabilitation; religion; plans to get involved in prison ministry; and work capacity. *See Williams*, 707 So.2d at 684-86. Except for the defendant's age, which was given "substantial weight," the trial court gave most of the mitigation relatively little weight. *Id.* at 684-85. Still, based on the remaining aggravating circumstance and a review of relevant cases, the Court found the defendant's death sentence to be disproportionate. *Id.* at 686. In the instant case, Hurst had little mitigation and more weighty aggravation, and thus a comparison of the cases does not demonstrate disproportionate treatment.

---

confessed to the crime, expressed remorse and the crime was arranged by older individuals; the defense presented significant expert testimony about defendant's psychological problems. *Snipes*, 733 So.2d at 1007-08.

[12] The defendant had suffered severe neglect and abuse; he was seventeen when the crime was committed; his mother spent several of his formative years in jail; he was surrounded by drugs and alcohol, and may have been molested; he was addicted to drugs and alcohol; the defense presented significant expert testimony about defendant's psychological problems.

As noted above, the trial court found two aggravating circumstances that were presented to the jury and argued by the State: (1) HAC (great weight); and (2) the murder was committed during the course of a robbery (great weight). The trial court also independently found that (3) the murder was committed for the purpose of avoiding arrest (great weight).

The trial court discussed three statutory mitigating circumstances: (1) Hurst's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired (little weight);[13] (2) no prior history of criminal conduct (moderate weight); (3) Hurst's age at the time of the crime (very little weight). The court also found four nonstatutory mitigating circumstances: (1) Hurst exhibited good conduct throughout every phase of the trial (little weight); (2) Hurst's contribution to the community was good in that he assisted his church and he assisted his neighbors in their time of need (little weight); (3) Hurst maintained regular church attendance and involved himself in weekly Bible study (little weight); (4) Hurst assisted his mother and father around the home and took care of and protected his younger siblings (moderate weight). Hurst's lack of previous convictions and his help around the house were given moderate weight, and all the other mitiga-

---

[13] There is some discrepancy in the sentencing order as to whether the trial court actually found that this mitigating circumstance had been established. The court wrote: "There was absolutely no evidence that [Hurst's] capacity was substantially impaired. To this mitigating factor the Court will give little weight." Because the court assigned some weight to this statutory mitigating factor, it seems as though the court found that it had been established, but that based on the limited evidence, Hurst was entitled to little mitigating weight.

tors were given little weight or very little weight. Furthermore, the jury voted eleven-to-one in favor of the death sentence after being instructed on only two aggravating circumstances.

The strong aggravation and the relatively little mitigation in this case is similar to other cases where the death penalty has been imposed and upheld. In fact, this Court recently affirmed the death sentence of a defendant who, like Hurst, had the HAC and "during the commission of a robbery" aggravating circumstances. *See Jeffries v. State*, 797 So.2d 573 (Fla.2001). While Hurst was younger, with mitigation value of "very little weight" assigned to his age, the mitigation in *Jeffries* was much more substantial than the mitigation found in the instant case. The *Jeffries* trial court found six mitigating circumstances: (1) defendant's capacity to appreciate the criminality of his conduct was impaired (some weight); (2) defendant's codefendant, who was equally culpable, pled guilty to second-degree murder and was sentenced to twenty years (some weight); (3) the defendant had a long history of mental problems (slight weight); (4) the defendant had a long history of drug and alcohol abuse (little weight); (5) defendant had attempted suicide (little weight); (6) the State offered the defendant a plea of life in prison (little weight). Like the jury in Hurst's trial, the jury in *Jeffries* recommended the death sentence by an eleven-to-one vote. *See also Geralds v. State*, 674 So.2d 96, 105 (Fla.1996) (affirming death sentence where murder was HAC and committed during the commission of a robbery and both statutory and nonstatutory mitigation was afforded little weight).

In sum, even after striking the avoid arrest aggravating circumstance, two aggravating circumstances still exist in this case including, importantly, the very

serious heinous, atrocious, and cruel aggravator. This substantial aggravation must be compared to the negligible mitigation found by the trial court. Even if the trial court marginally erred in assigning the appropriate weight to mitigation, as Hurst claims, after reviewing the record, we are convinced that the amount of mitigation evidence that was presented was minimal, at best. Thus, after conducting our proportionality review, we find no merit in Hurst's claim that the death sentence is disproportionate in this case.

"Apprendi" Claim

In his final claim, Hurst argues that "imposition of the death sentence in the absence of notice of the aggravating circumstances to be considered or of jury findings on the aggravators and death eligibility, violates due process and the protection against cruel and/or unusual punishment." In making this argument, Hurst relies primarily on the United States Supreme Court's opinion in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). Subsequent to the filing of Hurst's initial brief, this Court decided this issue and has rejected the argument that the *Apprendi* case applies to Florida's capital sentencing scheme. *See Mills v. Moore*, 786 So.2d 532 (Fla.), *cert. denied*, 532 U.S. 1015, 121 S.Ct. 1752, 149 L.Ed.2d 673 (2001); *Mann v. Moore*, 794 So.2d 595 (Fla.2001). In his reply brief, Hurst requests that this Court revisit the *Mills* decision and find that *Apprendi* does apply to capital sentencing schemes. Having considered the cases Hurst cited and his additional arguments, this Court finds no reason to revisit the *Mills* decision, and thus we reject Hurst's final claim.

CONCLUSION

Accordingly, for the reasons expressed, we affirm Hurst's conviction and sentence of death.

It is so ordered.

WELLS, C.J., and HARDING, LEWIS, and QUINCE, JJ., concur.

ANSTEAD, J., concurs in part and dissents in part with an opinion, in which SHAW and PARIENTE, JJ., concur.

ANSTEAD, J., concurring in part and dissenting in part.

I concur in most all respects with the majority opinion, with the important exception, however, of its harmless error analysis as to the trial court's error in finding the avoid arrest aggravating circumstance.

I agree with the majority's holding that the trial court erred in finding and weighing the avoid arrest aggravator. In fact, it is clear from the record that during the penalty phase the State expressly waived any reliance upon this aggravator. However, because the trial court not only clearly relied upon this aggravating circumstance in determining appellant's sentence, but also assigned it the highest level of weight, I cannot agree that the trial court's error was harmless. Thus, I would remand for resentencing by the trial court without consideration of the erroneous aggravator.

I agree that when the Court "strikes one or more aggravating circumstances relied upon by a trial judge in sentencing a defendant to death, we may conduct a harmless error analysis based on what the sentencer found in determining whether the sentence of death is

still appropriate." *See Hill v. State*, 643 So.2d 1071, 1073 (Fla. 1994). However, an error in weighing the aggravating and mitigating circumstances is not harmless where the absence of the error could have resulted in a lesser sentence. *Rogers v. State*, 511 So.2d 526, 535 (Fla.1987). In our seminal decision in *State v. DiGuilio*, 491 So.2d 1129, 1138 (Fla.1986), we explicitly held that only where the State has demonstrated there is no reasonable possibility that the error affected the outcome, can an error be considered harmless.

Furthermore, in conducting a harmless error analysis, this Court must not "misread the trial judge's findings regarding mitigating circumstances and affirm based on a mischaracterization of the trial judge's findings." *Parker v. Dugger*, 498 U.S. 308, 320, 111 S.Ct. 731, 112 L.Ed.2d 812 (1991); *see also Hill v. State*, 643 So.2d at 1073-74. While this Court's underlying decision in *Parker* concerned a mischaracterization of the trial court's mitigation findings, it is equally important that we not mischaracterize the trial court's aggravation findings in our harmless error evaluation. The majority's decision requires the Court to ignore the "great weight" that the stricken aggravator was given in the trial court's decision to impose the death penalty. When a trial court's sentencing order acknowledges that a particular aggravator played a key role in the decision to impose the death penalty, the subsequent removal of that aggravator cannot reasonably be deemed harmless.

One need simply read the trial court's sentencing order to see that the finding of that aggravator was of key importance in the trial court's decision to sentence Hurst to death. Specifically, the trial court found:

> While not argued by the State, it is apparent that there was no need for the Defendant to kill the victim just to obtain the money from the safe. The victim knew the Defendant inasmuch as both the victim and the Defendant were employed at Popeye's. The Defendant could have taken the money and fled leaving the victim unharmed. Therefore, one can only conclude that the killing of the victim was for the sole purpose of avoiding arrest for robbery. Accordingly, to this aggravating circumstance the Court will give great weight.

In the instant case, the trial court's sentencing order indicates that the stricken aggravator was given "great weight." Under such circumstances this error could hardly be deemed harmless as having no effect on the sentencing decision.

SHAW and PARIENTE, JJ., concur.

IN THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT
IN AND FOR ESCAMBIA COUNTY
STATE OF FLORIDA

STATE OF FLORIDA,
Plaintiff/Respondent.

vs.

TIMOTHY LEE HURST,
Defendant/Petitioner.

Case No.: 1998 CF 001795 A
Division: C
[FILED STAMP: 2007 AUG 23 P 4:52]

ORDER DENYING DEFENDANT'S MOTION TO VACATE JUDGMENT OF CONVICTION AND SENTENCE

THIS CAUSE comes before the Court on Defendant's "Motion to Vacate Judgment of Conviction and Sentence," pursuant to Florida Rule of Criminal Procedure 3.851,[1] filed October 16, 2003; Defendant's "Supplemental Motion to Vacate Judgment of Conviction and Sentence," filed September 30, 2004; Defendant's "Second Supplemental Motion to Vacate Judgment of Conviction and Sentence," filed January 24, 2005; Defendant's "Third Supplemental Motion to Vacate

---

[1] According to Defendant's motion, the instant motion is filed pursuant to Florida Rules of Criminal Procedure 3.850 and 3.851. However, because the motion was filed after October 1, 2001, only rule 3.851 is applicable to Defendant's claims for postconviction relief. See Fla. R. Crim. P. 3.851.

Judgment of Conviction and Sentence," filed May 23, 2005; and Defendant's "Fourth Supplemental Motion to Vacate Judgment of Conviction and Sentence," filed September 29, 2005. After full consideration of the instant motion and supplements, the State's responses and Defendant's replies thereto, evidence adduced at evidentiary hearing, written arguments submitted by Defendant and the State, the record, and relevant legal authority, the Court finds that Defendant is not entitled to relief.

PROCEDURAL HISTORY

The Court conducted a case management conference ("Huff[2] hearing") on February 23, 2004. After consideration of the pleadings and the arguments presented at the hearing, the Court determined that an evidentiary hearing was necessary as to Defendant's claims II (newly discovered evidence), III (ineffective assistance of counsel during trial), and V (Atkins[3] claim) in their entirety, and as to claims I (Brady[4] and Giglio[5] violations) and IV (ineffective assistance of counsel during penalty phase), in part. The Court found Defendant's claims VI (Ring[6] claim), and IX (cu-

---

[2] See Huff v. State, 622 So. 2d 982 (Fla. 1993).

[3] See Atkins v. Virginia, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002).

[4] See Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963).

[5] See Giglio v. United States, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972).

[6] See Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2438, 153 L. Ed. 2d 556 (2002).

mulative error)[7] could be decided as a matter of law and were therefore inappropriate for evidentiary hearing.

The Court conducted a limited evidentiary hearing as to claims I, II, III, IV, and V on June 16 through June 18, 2004, and on July 9, 2004. Defendant was present and represented by counsel.[8] On June 18, 2004, during the testimony of Investigator Donald "Buddy" Nesmith, an issue arose regarding the investigator's handwritten field notes. Apparently, Investigator Nesmith had failed to disclose to the Office of the State Attorney and Defendant personal notes he had taken during the investigation of the instant case. After allowing the State to review the documents, and after a hearing where the Escambia County Sheriff's Office waived any exemption to disclosure it may have invoked, a copy of the field notes was provided to Defendant's postconviction counsel. The Court granted Defendant leave to amend his motion in regard to any Brady or Giglio claims that may have become apparent since the discovery of the field notes.

On September 30, 2004, Defendant filed his first supplement to the instant motion containing two claims regarding additional Brady and Giglio violations, and *ex parte* communications between the State and the trial

---

[7] Originally, Defendant's cumulative error claim was numbered "VII." Since the addition of Defendant's supplemental claims, however, the Court has renumbered Defendant's cumulative error claim as "IX" within this order.

[8] As requested and noted at evidentiary hearing, the Court takes judicial notice of "all of the court records of these proceedings." See Evidentiary Hearing Transcript (EHT), Vol. I, p. 4. The Court also takes judicial notice of the file of Lee "Lee-Lee" Smith, Jr. See EHT, Vol. II, p. 336.

court judge.[9] On January 24, 2005, Defendant filed his second supplement to the instant motion alleging one new claim based upon Anderson.[10] On August 17, 2005, this Court entered an order denying an evidentiary hearing as to Defendant's first and second supplemental motions. The denial was without prejudice for Defendant to take depositions and allege a facially sufficient claim regarding *ex parte* communications.

On May 23, 2005, Defendant filed his third supplement to the motion, alleging an additional claim of newly discovered evidence. Ultimately, the Court determined that an evidentiary hearing would not be convened regarding this claim.

On September 29, 2005, Defendant filed his fourth supplement to the motion, thereby amending the claim regarding *ex parte* communications originally alleged in Defendant's first supplemental motion. The Court determined that this claim could be decided as a matter of law and did not require an evidentiary hearing.

I. BRADY AND GIGLIO VIOLATIONS

Defendant alleges multiple instances of Brady and Giglio violations in the original motion and supplements filed. Under Brady, the State is required to disclose to the defense any evidence in its possession or control that is favorable to the accused or tends to negate the guilt of the accused. See State v. Knight, 866 So. 2d 1195, 1201 (Fla. 2003). In order to demonstrate a Brady violation. Defendant must prove three elements: "(1)

---

[9] The guilt and penalty phases of the trial were convened before a different judge than the judge presiding over the postconviction proceedings. This claim arose as a consequence of the prosecutor's testimony at evidentiary hearing.

[10] See Anderson v. State, 574 So. 2d 87 (Fla. 1991).

the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) that evidence has been suppressed by the State, either willfully or inadvertently; and (3) prejudice must have ensued." Id. (quoting Strickler v. Greene, 527 U.S. 263, 281-82, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999)); see also Way v. State, 760 So. 2d 903, 910 (Fla. 2000). In assessing the prejudice element of a claim alleging a Brady violation, a court should determine whether the favorable evidence to the defendant could "reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." See Knight, 866 So. 2d at 1201 (quoting Strickler, 527 U.S. at 290); see also Occhicone v. State, 768 So. 2d 1037, 1041 (Fla. 2000). "Furthermore, in reviewing whether prejudice has ensued, "[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." Knight, 866 So. 2d at 1201 (quotation marks omitted) (quoting Strickler, 527 U.S. at 289-90). A Brady violation does not exist where the information is equally accessible to the defense and the prosecution, or where the defense had the information or could have obtained it through the exercise of reasonable diligence. See Provenzano v. State, 616 So. 2d 428, 430 (Fla. 1993) (citing Hegwood v. State, 575 So. 2d 170, 172 (Fla. 1991)).

In contrast to an allegation of suppression of evidence under Brady, a Giglio claim is based upon the prosecutor's knowing presentation of false testimony against the defendant at trial. See Guzman v. State, 868 So. 2d 498, 506 (Fla. 2003). To establish a Giglio violation, a defendant must demonstrate the following:

"(1) the testimony given was false; (2) the prosecutor knew the testimony was false; and (3) the statement was material." Guzman v. State, 941 So. 2d 1045, 1050 (Fla. 2006). "Under Giglio, a statement is material if there is a reasonable probability that the false evidence may have affected the judgment of the jury." Ventura, 794 So. 2d 553, 562 (Fla. 2001) (quotation marks omitted) (quoting Routly v. State, 590 So. 2d 397, 400 (Fla. 1992)). Further, "[i]n analyzing this issue ... courts must focus on whether the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine the confidence in the verdict." Ventura, 794 So. 2d at 562 (quoting White v. State, 729 So. 2d 909, 913 (Fla. 1999)). Under this standard, the State has the burden of proving that the false testimony was not material by demonstrating that its presentation to the jury was harmless beyond a reasonable doubt. See Guzman, 941 So. 2d at 1050; see also Mordenti v. State, 894 So. 2d 161, 175 (Fla. 2004). With these requirements in mind, the Court will address Defendant's claims alleging Brady and/or Giglio violations.

1. Anthony Williams

Anthony Williams was a fellow jail inmate of Defendant's who testified at trial that Defendant told him that Defendant had participated in the murder of Cynthia Harrison, the victim in the instant case.[11] Defendant alleges that the State violated Brady by failing to disclose that it had made "promises of leniency" to Mr. Williams in exchange for his testimony against Defendant.

---

[11] See Attachment 1, Trial Transcript (TT), Vol. II, pp. 356-363.

Defendant further argues that the prosecutor's closing argument violated Giglio because the prosecutor withheld the fact that Mr. Williams had a "deal" in place.

At evidentiary hearing, Mr. Williams testified that Defendant did not confess to him about murdering the victim. Instead, Mr. Williams admitted he had testified falsely because the prosecutor told him he would be "take[n] care of ... in the long run."[12]

Recanted testimony, especially when it involves a confession of perjury, is "exceedingly unreliable." Armstrong v. State, 642 So. 2d 730, 735 (Fla. 1994).

> In assessing recanted testimony, [the Florida Supreme Court has] stressed caution, noting that it may be unreliable and trial judges must "examine all of the circumstances in the case." Accordingly, "recantation by a witness called on behalf of the prosecution does not necessarily entitle a defendant to a new trial." That is the purpose of an evidentiary hearing.

Lightbourne v. State, 841 So. 2d 431, 441 (Fla. 2003) (citing Robinson v. State, 707 So. 2d 688, 691 (Fla. 1998) (citations omitted)).

The Court finds Mr. Williams' testimony at evidentiary hearing not credible. During cross-examination it was revealed that Mr. Williams had stated in his deposition that he was providing information regarding Defendant's confession or inculpatory statements to the State because it was "the right thing to do," and because Mr. Williams's mother had advised him it was the

---

[12] See EHT, Vol. II, p. 275.

"right thing to do."[13] Although Mr. Williams now avers that he committed perjury during the deposition,[14] this Court does not find Mr. Williams' testimony credible on this issue.

Mr. Williams further testified at evidentiary hearing that he is now telling the truth because "you cannot go through life knowing that you committed wrongs against others."[15] However, the Court finds it quite telling that Mr. Williams did not come forward with this information until approximately two years after Defendant had been sentenced to death.[16] The timing of Mr. Williams' "new revelations" does not bode well for his credibility. The Court further notes that Mr. Williams' demeanor throughout his evidentiary hearing testimony was defensive and antagonistic, indicating to this Court that his testimony at evidentiary hearing was not truthful.[17]

David Rimmer, the prosecutor in the instant case, testified at evidentiary hearing that he did not make any promises to Mr. Williams about his cases.[18] Mr.

---

[13] See EHT, Vol. II, pp. 285-286.

[14] See EHT, Vol. II, p. 290.

[15] See EHT, Vol. II, p. 290.

[16] At evidentiary hearing, A. Williams testified that he did not come forward sooner because he did not know who he should contact with the information. The Court finds it convenient that even though A. Williams has been represented by four attorneys since testifying at Defendant's trial, A. Williams has been unable to obtain assistance in bringing this information to the correct person(s) earlier. See EHT, Vol. II, pp. 290-295.

[17] See EHT, Vol. II, pp. 271-295.

[18] See EHT, Vol. IV, p. 671.

Rimmer also testified that it was his practice when dealing with "inmate-snitches" to "never give them any indication that I'm going to do anything. I always, in fact, cut them off and tell them to start with, I can't make you any promises."[19] The Court finds Mr. Rimmer's testimony on this subject credible.

As the Court has determined that Mr. Williams was not offered a "deal" for his "perjured" testimony at trial, Defendant has failed to establish that either a Brady or Giglio violation occurred as to Mr. Williams' testimony. Defendant is not entitled to relief as to this claim.

2. David Kladitis

David Kladitis testified at trial that he saw Defendant's vehicle driving behind the victim's vehicle on the morning of May 2, 1998, the date of the murder.[20] Defendant now alleges that Mr. Kladitis also provided information to law enforcement and the assistant state attorney that he observed two to three black males in two separate vehicles in the Popeye's parking lot earlier that morning. Defendant asserts that the Escambia County Sheriff's Office and the prosecutor in the instant case both informed Mr. Kladitis that they "did not want to hear" about this other information, but they only wanted to know about Mr. Kladitis' observations regarding Defendant. Allegedly, the information regarding the other persons outside of the Popeye's restaurant was not disclosed to the defense.

Investigator Nesmith's notes indicate that Mr. Kladitis did indeed reveal this additional information

---

[19] See EHT, Vol. IV, p. 675.

[20] See Attachment 1, TT, Vol. II, pp. 291-298.

when he was interviewed by Investigator Nesmith. The record demonstrates that this information was not introduced into evidence during the trial. Defendant contends that this additional information was "blatantly and improperly" suppressed by law enforcement and the prosecutor in violation of Brady.

Mr. Kladitis testified at evidentiary hearing that while he was eating breakfast at approximately 6:40 a.m., he saw "a couple" of African-American males in the parking lot of the Popeye's restaurant; they were in plain view and playing their music "real loud."[21] When considering this testimony with the other testimony introduced at trial, the Court finds that this additional information does not undermine confidence in the verdict rendered. At trial, Jeanette Pugh (formerly Jeanette Hayes) testified that she spoke with the victim on the telephone at 7:55 a.m.[22] Ms. Pugh specifically testified that she did not hear any type of noise in the background, and that the victim did not sound scared, but sounded normal.[23] The exact time of the murder was never determined, but the victim was killed sometime before 10:30 a.m., when her body was found at the restaurant.[24] Therefore, at least one hour prior to the murder, Mr. Kladitis observed persons in the Popeye's parking lot, who were in plain sight and who were conspicuously playing "real loud" music. It would stand to reason that law enforcement and the prosecutor were

---

[21] See Evidentiary Hearing Transcript, July 9, 2004 ("EHT2"), pp. 11-12.

[22] See Attachment 1, TT, Vol. II, pp. 287.

[23] See Attachment 1, TT, Vol. II, pp. 285-288.

[24] See Attachment 1, TT, Vol. II, pp. 220-223; Vol. V, pp. 898-899.

not "interested" in this information, and wanted to concentrate on the information that could actually be pertinent to the crime, i.e., the observation of Defendant's vehicle following the victim later on that morning. Additionally, the Court notes that Mr. Kladitis testified at evidentiary hearing that neither the investigator nor the prosecutor suggested that he should withhold this information.[25] Consequently, the Court finds that, when taken in consideration with the totality of the evidence produced at trial, Defendant has failed to demonstrate the requisite prejudice necessary to establish a Brady violation. Defendant is not entitled to relief as to this claim.

3. Jeanette Rogers (formerly Jeanette Pugh and Jeanette Hayes)

At trial, Jeanette Pugh testified that she spoke with the victim at 7:55 a.m. the morning of the murder.[26] Defendant alleges that after Ms. Pugh gave this information to the authorities, that an Escambia County Sheriff's deputy told her to "keep your mouth shut" about the telephone conversation she had with the victim. Defendant alleges that this directive by law enforcement demonstrates a "nefarious" pattern of police and prosecutorial misconduct.

At evidentiary hearing, Ms. Pugh (now Ms. Rogers) testified that an unknown person told her that she "should not be talking to anyone."[27] She testified that she did not know if the person was with law enforce-

---

[25] See EHT2, pp. 17-20; 24-25.

[26] See Attachment 1, TT, Vol. II, p. 287.

[27] See EHT, Vol. II, pp. 322-323.

ment, as the person was not wearing a uniform.[28] Additionally, Ms. Pugh was not giving a statement to law enforcement when the unknown person indicated that she should not be talking. Instead, she was speaking with Popeye's "employees" immediately after the incident.[29] The Court finds that Defendant's claim is based upon mere speculation; there is no evidence before this Court to suggest that the unknown person involved was with law enforcement. Additionally, as Ms. Pugh testified on behalf of the State, the jury could have plausibly inferred that the unknown person was a person close to Defendant that did not want Ms. Pugh talking about the incident. Further, there is no evidence to suggest that the unknown person's statement to Ms. Pugh hampered her in providing complete and accurate information to authorities and at trial.[30] Defendant has failed to meet the prerequisites to demonstrate a Brady violation, and he is not entitled to relief as to this claim.

4. Wal-Mart

Defendant gave a recorded statement to law enforcement regarding his activities on the day of the murder. Nowhere within the recorded statement was there any indication that Defendant had informed the authorities that he had gone to Wal-Mart.[31] Defendant's recorded statement was played for the jury during trial.[32] The State introduced evidence at trial that Defendant had gone to Wal-Mart after killing the vic-

---

[28] See EHT, Vol. II, p. 327.

[29] See EHT, Vol. II, pp. 325 & 328-329.

[30] See EHT, Vol. II, pp. 331-333.

[31] See Attachment 1, TT, Vol. III, pp. 521-541.

[32] See Attachment 1, TT, Vol. III, pp. 520-541.

tim so that he could purchase shoes to replace the shoes he had worn during the murder.[33] During closing argument, the prosecutor argued that part of the reason the jury should discount Defendant's recorded statement was the fact that he did not mention Wal-Mart in his recorded statement. [34]

Defendant now alleges that the State was aware that Defendant did, in fact, inform authorities that he had gone to Wal-Mart the day of the murder. Defendant cites to Investigator Nesmith's report and Officer Sanderson's report as proof that Defendant was forthright regarding his trip to Wal-Mart, and that he did not try to hide the fact that he went to Wal-Mart from authorities. Defendant alleges that the presentation of evidence and the closing argument made by the prosecution regarding Defendant's failure to mention Wal-Mart to the authorities is a violation of Giglio.[35]

At the evidentiary hearing, Investigator Nesmith testified that "Timothy Hurst never told me he went to Wal-Mart. I learned that from Lee-Lee Smith."[36] Nesmith explained that he conducted the recorded interview with Defendant on May 2, 1998,[37] and the rec-

---

[33] See Attachment 1, TT, Vol. III, pp. 399-402; pp. 484-487; pp. 542-544.

[34] See Attachment 1, TT, Vol. V, pp. 829-830; 844-845; 892-893; 899-900.

[35] Defendant also alleges ineffective assistance of counsel arising from this claim which the Court will address later in this order.

[36] See EHT, Vol. III, p. 521.

[37] See EHT, Vol. IV, p. 593.

orded interview of Lee-Lee Smith on May 3, 1998,[38] but that he did not compile his report until June 23, 1998.[39] By the time Investigator Nesmith compiled his report, he had learned from Lee-Lee Smith that Defendant had gone to Wal-Mart. Therefore, Nesmith's report was in error to the extent that it appears to provide that Defendant personally told Nesmith he went to Wal-Mart on the day of incident.[40] Nesmith also testified that Defendant said nothing about going to Wal-Mart during the non-recorded pre-interview.[41] The Court finds Investigator Nesmith's testimony on this topic credible.

Officer Sanderson testified at the evidentiary hearing that the content of his report was based upon a telephone conversation he had with Nesmith.[42] Sanderson explained that his report regarding the conversation was not made contemporaneously, and that the report did not quote Nesmith, but was "generalize[d]."[43] Sanderson did not know whether Defendant mentioned Wal-Mart in his statement to Nesmith, because he was basing his report on second-hand information.[44]

David Rimmer, the prosecutor in the instant case, admits that he reviewed both Nesmith's and Sanderson's reports indicating that Defendant had informed

---

[38] See EHT, Vol. IV, pp. 594-595.

[39] See EHT, Vol. III, p. 523.

[40] See EHT, Vol. IV, pp. 547-549; 603-604.

[41] See EHT, Vol. IV, pp. 593-594.

[42] See EHT, Vol. III, pp. 367-372.

[43] See EHT, Vol. IV, p. 387.

[44] See EHT, Vol. III, p. 395.

law enforcement that he went to Wal-Mart.[45] However, Rimmer testified that the reports regarding this detail were obviously in error, based upon the recorded statement of Defendant.[46] Rimmer testified that he felt comfortable in representing to the jury through evidence and closing argument[47] that Defendant did not tell the authorities during his recorded statement that he went to Wal-Mart the day of the murder.

Based upon the testimony adduced at evidentiary hearing regarding this issue, and the totality of the evidence presented at trial, the Court finds that Defendant has failed to meet even the first prong to demonstrate a Giglio violation: that the prosecutor presented or failed to correct false testimony. The Court finds that Defendant did not tell Investigator Nesmith that he went to Wal-Mart the day of the murder. The prosecutor did not present false evidence, nor did he represent a falsity to the jury in his closing argument on this subject. Defendant has failed to meet the requirements of Giglio, and he is not entitled to relief on this basis.

5. Lee ("Lee-Lee") Smith, Jr.

Lee-Lee Smith testified that Defendant had confessed to him that he had murdered the victim. Smith also testified that, at Defendant's direction, Smith

---

[45] See EHT, Vol. IV, pp. 615.

[46] See EHT, Vol. III, pp. 441-442; 448-449; Vol. IV, pp. 612; 615-616.

[47] The Court is cognizant that allegations of improper closing argument are ordinarily considered procedurally barred as such allegations should be raised on direct appeal. See Kelley v. State, 569 So. 2d 754, 756 (Fla. 1990). However, because Defendant couples this allegation with his claim regarding the presentation of evidence, the Court will consider the claim on the merits.

washed Defendant's clothes and disposed of evidence.[48] Physical evidence from the scene was found in Smith's bedroom and the trash can found outside of the Smith home.[49]

Defendant contends that prior to Smith's trial testimony, the State informed Smith that he would be charged in connection with the murder. Defendant alleges that this was never disclosed to defense counsel. Defendant argues that if his trial counsel had been aware of this fact, counsel could have argued to the jury the discrepancies between charging Defendant and Smith, and that Smith had been promised lesser treatment for his testimony.[50] Defendant alleges that the State's failure to reveal its intention to charge Lee-Lee Smith in the instant case was a violation of both Brady and Giglio.

At the evidentiary hearing, Smith first testified that he was not told he would be charged with a crime prior to giving testimony in the instant case.[51] Later, he testified it was either after the trial or during the trial he was notified that he would be charged with a crime.[52] Later still, Smith testified that he really did not remember when he was informed by the prosecu-

---

[48] See Attachment 1, TT, Vol. III, pp. 396-397.

[49] See Attachment 1, TT, Vol. III, pp. 498-501; 572-583.

[50] The Court has taken judicial notice of the court record in Lee-Lee Smith's case, demonstrating that Smith was indeed charged after completion of Defendant's trial as an accessory after the fact to the murder of the victim in the instant case. Smith's case was adjudicated in juvenile court.

[51] See EHT, Vol. II, pp. 336-337.

[52] See EHT, Vol. II, pp. 338.

tor, David Rimmer, that he would be charged.[53] Eunice Smith, Lee-Lee's mother, testified at the evidentiary hearing that Mr. Rimmer informed Lee-Lee before Defendant's trial that he would be charged in the instant case.[54] Mr. Rimmer also testified at evidentiary hearing and indicated that he did not tell Smith before Defendant's trial that he intended to charge him with a crime related to the instant case.[55] Rimmer testified specifically that when he met with Smith and his mother prior to Defendant's trial he "never said that he'd be charged in the case."[56] In fact, Rimmer specifically recalled that at some point he was asked by the trial judge why he had not charged Smith. Rimmer informed the judge that he had not decided at that point if he would charge Smith.[57] The Court finds Mr. Rimmer's testimony credible as to the issue of whether he informed Lee-Lee Smith before Defendant's trial that Smith would be charged in the instant matter. Accordingly, the Court finds that Defendant has failed to demonstrate that either Brady or Giglio violations occurred.

Defendant also asserts that Nesmith's notes demonstrate two Brady violations regarding prior statements made by witness Lee-Lee Smith. The alleged violations arise from Nesmith's notes taken dur-

---

[53] See EHT, Vol. II, pp. 335-339.

[54] See EHT, Vol. II, pp. 353-358.

[55] See EHT, Vol. IV, p. 669-670.

[56] See EHT, Vol. IV, p. 680.

[57] This testimony at evidentiary hearing is the basis for Defendant's claim VIII alleging *ex parte* communications between the prosecutor and the trial judge. See EHT, Vol. IV, pp. 670; 686-691.

ing an interview with Smith, providing that Smith "said he got rid of the weapon and mopped all the blood up" and "get rid of the weapon- in the dumpster behind Popeye's."

First, Defendant takes issue with the ambiguity that arises from several notations listing "he." This claim, however, is without merit as the Court finds that "he" obviously refers to Defendant and not Smith or some other unnamed third party. Moreover, such a claim as pled does not amount to a Brady violation because it depends upon speculation. The first element of a Brady violation requires that the evidence ***must*** be favorable, not that it ***might*** be favorable if given one of several interpretations.

The other alleged Brady violation involves Smith's statements regarding Defendant's disposal of the murder weapon. Defendant contends that Smith's May 6, 1998 statement, as reflected in Investigator Nesmith's notes, provides that Defendant "said he got rid of the weapon and mopped all the blood up." Defendant alleges that this statement is contrary to the facts of the case, where the murder weapon was actually found in plain view close to the victim's body.[58]

As a preliminary matter, the Court notes that the record demonstrates that trial counsel possessed a transcript of Lee-Lee Smith's May 6, 1998 recorded statement. At trial, the following exchange occurred between Smith and trial counsel for Defendant during cross-examination:

> Q. [By Mr. Arnold, defense counsel] All right. Mr. Smith, after that May 3 statement - ***isn't it***

---

[58] See Attachment 1, TT, Vol. II, pp. 242-243.

true that you went back about three days later on May 6 and gave them another statement?
Isn't that right -

A. [By Mr. Smith] Yes.

Q. - with the deputy?

A. Yes.

Q. And it was Deputy Buddy Nesmith that talked to you, him and Tracy Yuhasz, wasn't it?

A. Yes.

* * *

Q. ***And they put you under oath and all of that and recorded another statement?***

A. ***Yes.***

Q. Now, in that statement, isn't it true that you told the police officers that Tim told you on Friday night that he was going to rob Popeye's and kill the manager and slip up behind her and slit her throat?

A. No, I don't remember saying that.

Q. You don't remember telling them that?

A. Uh-uh.

MR. ARNOLD: May I approach the witness?

THE COURT: Yes.

Q. ***This, sir, is a transcript of that May 6 recorded statement.***

A. Yes.

Q. ***And the question was: "What did he say he was going to do?" And was your answer: "He said he was going to rob Popeye's and kill the manager, come right up behind her and slit her throat"? Now, isn't that what you told them then, Mr. Smith?***[59]

A. I don't remember saying that.

Q. Okay. So what did they do? They just misrecorded that?

A. I don't know.

Q. In this same statement, did you tell the police what he was going to slit her throat with?

A. Did I tell them?

Q Yeah.

A. No. I told them what he did it with.

* * *

Q. What did you tell them he did it with?

A. A box cutter.

Q. A box cutter?

A. Because I seen it in the newspaper.

* * *

Q. Well, that's my point, Mr. Smith. Everything you told them you saw in the newspaper, isn't it?

A. Everything? No.

---

[59] Although not dispositive, the Court notes that the excerpts referencing Lee-Lee Smith's recorded statement are substantially similar to statements found in Investigator Nesmith's notes.

Q. You told the cops that he did it with a box cutter because you saw it in the newspaper; isn't that true?

A. I thought they were asking me what did he do it with.

Q. Yeah, and you told them a box cutter.

A. Yeah.

Q. And then you just said because you saw it in the newspaper, did you not?

A. Yes.

Q. And that's where all of that stuff came from, isn't it, Mr. Smith?

A. That I'm telling you now?

Q. Whatever you told anybody. That's where it came from, isn't it?

A. Yeah. You will believe what you want to, though.

Q. Didn't you also tell the police that you and old Tim here planned that robbery, and you was going to go with him but you backed out? Didn't you tell them that?

A. I was going to go with him, but I backed out? Is that what you said?

Q. Yes, sir. Isn't that what you told the cops?

A. (Witness shakes head negatively.)

Q. You didn't?

A. Uh-uh.

Q. All right. ***Do you remember being asked this question during that May 6 session over***

there with Deputy Nesmith: "What was the plan?" Do you remember that question?

A. Yeah.

Q. Tell us what your answer was.

A. What was the plan?

Q. Yeah.

A. He told me he was going to rob Popeye's.

MR. ARNOLD: May I approach?

THE COURT: Yes.

Q. Was your answer, Mr. Smith -

A. Yeah, I know.

Q. "Kind of was for me to go down there, go down there with him and be watchout man for him, and then come out and signal him and help him watch the place." And you even described the signal, didn't you?

A. No.

Q. Well, did you tell them that?

A. No.

Q. You didn't tell them that?

A. No.

Q. You were under oath during this little segment, right?

A. Yes.

Q. And you're testifying now you did not tell the police that? Is that your testimony?

A. Yes.

Q. All right, and were you asked, "Then what were you going to do?" Do you remember that question?

A. (Witness shakes head negatively.)

Q. You don't remember that?

A. (Witness shakes head negatively.)

MR. ARNOLD: May I approach?

THE COURT: You may.

Q. Were you then asked -- "Go in and help him rob the place." Was that your answer?

A. No.

Q. You didn't tell them that?

A. (Witness shakes head negatively.)

Q. Sir?

A. I don't remember.

Q. And if they've got a tape with your voice on it saying those things, it ain't you, right? What did they do, fix that tape?

A. I don't know.

Q. Tell us this, Mr. Smith: Did you tell the police something about a wig and a pair of glasses?

* * *

A. No.

Q. You're real sure?

A. Yes, I'm sure.

Q. Did you know that this lady wore a wig and glasses?

A. No, sir.

Q. You didn't?

A. Uh-uh.

Q. And if it's in that statement, then you didn't know about it, right?

A. I think they mentioned it to me, but I didn't know that she wore a wig and glasses.[60]

The Court recognizes that the extensive cross-examination catalogued above does not conclusively refute Defendant's claim that the State failed to disclose Smith's statement regarding the location of the murder weapon. However, it is clear from trial counsel's cross-examination that he was provided a transcript of the recorded statement that occurred contemporaneously with the interview session that spawned the notes in question. Trial counsel effectively utilized the information he had regarding the May 6, 1998 interview to impeach Smith. Therefore, due to the extent of the im-

---

[60] See Attachment 1, TT, Vol. III, pp. 453-459 (emphasis added). Although it is clear that trial counsel was provided with a transcript arising from Lee-Lee Smith's recorded May 6, 1998 statement, it is not clear in which response to discovery the transcripts were disclosed. Transcripts of recorded statements for "Lee E. Smith" and "Lee Smith, Jr." are listed on "Response to Notice of Discovery" filed 06/12/98 (Amendment B, #9. Transcript of recorded statement of Lee E. Smith consisting of 12 pages) and "Amended Discovery Exhibit" filed 08/03/98 (#20. Transcript of Lee Smith, Jr. taken at 6:22 p.m. and consisting of 7 pages, and #21. Transcript of Lee Smith taken 05/03/98 at 8:17 p.m. consisting of 3 pages). None of these recorded statements are contained in the official court record, nor were they referred to by either party in the instant pleadings or at the second Huff hearing.

peachment described above, and in light of the entire record in this case, Defendant's claim alleging the State improperly withheld Mr. Smith's statement that Defendant "got rid of the murder weapon," fails as a matter of law for lack of prejudice. The Court finds that Defendant has failed to meet the prerequisites to demonstrate a Brady violation as to this issue, and he is not entitled to relief as to this claim.

6. Carl Hess

At trial, Carl Hess testified that he was working at the Wendy's restaurant located across from the Popeye's restaurant, when he saw the victim arrive at the Popeye's restaurant between 7:00 a.m. and 8:30 a.m.[61] Afterwards, Hess saw a man who was approximately six feet tall, weighing between 280-300 pounds, arrive at Popeye's and bang on the glass windows until he was let inside.[62] Hess testified that the man was dressed in a Popeye's uniform.[63] Hess recognized the person as Defendant because he had seen Defendant working at Popeye's and Defendant had applied for a job at the Wendy's restaurant where Hess worked.[64]

Defendant claims that the State committed both Giglio and Brady and violations regarding Carl Hess's statements to law enforcement and his testimony given at trial. Regarding the alleged Giglio violations, Defendant specifically alleges that the State elicited false testimony from Hess regarding: 1) the time he saw the victim arrive; 2) the "interview" with Defendant; and 3)

---

[61] See Attachment 1, TT, Vol. II, pp. 299-300.

[62] See Attachment 1, TT, Vol. II, pp. 302-303.

[63] See Attachment 1, TT, Vol. II, pp. 302-303.

[64] See Attachment 1, TT, Vol. II, pp. 302-304.

the identification of Defendant's car. Regarding the first and third alleged Giglio violations, Defendant has failed to demonstrate that any false testimony was presented. Consequently, a violation of Giglio cannot exist as to Defendant's first and third allegation.

As to the second alleged Giglio violation, the claim fails to satisfy the materiality prong of Giglio. During trial, the following exchange occurred between Defendant's trial counsel and Hess during cross-examination:

> Q. [By Mr. Arnold] And is it your testimony under oath that you questioned Mr. Hurst and interviewed him for employment at Wendy's?
>
> A. [By Mr. Hess] Yes, sir.
>
> Q. As assistant manager?
>
> A. As a manager trainee. I said assistant manager on there [during deposition].
>
> Q. You did say assistant manager in your deposition?
>
> A. Yes, sir. Yes.
>
> Q. The truth is, you didn't have that authority to interview applicants, did you?
>
> A. No.
>
> Q. But didn't you also say that you had interviewed five or six other people?
>
> A. Yes, sir.
>
> Q. And rejected three of them?
>
> A. Yes, sir.
>
> Q. Including Mr. Hurst?
>
> A. Yes, sir.

Q. But you didn't have that authority either, did you?

A. No, sir...[65]

In fact, trial counsel went so far as to call the general manager of the Wendy's location, Sun Nguyen, to impeach Hess's testimony that he interviewed Defendant:

Q. Okay. And do you know where Mr. Hess was assigned, if he was, to work?

A. He was one of our openers in the morning who basically cleaned up the parking lot, did some cleanup in the store, did our freezer pull, and just basically got us ready to open.

* * *

Q Okay. Was Mr. Hess an assistant manager there?

A. No, he was not.

Q. Was he a general manager?

A. No, he was not.

Q. Was he a co-manager?

A. No, he was not.

Q. Did he have any management responsibilities on May 2nd of 1998?

A. No, he did not.

Q. What about prior to May 2nd of 1998?

A. I don't believe he did.

---

[65] See Attachment 1, TT, Vol. II, pp. 311-312.

Q. Okay. At one point in time, Mr. Nguyen, was he recommended for the associate manager program?

A. Yeah, he did go into the management program at one time.

Q. And was he rejected from that?

A. Yes, he was.

Q. Failed some test?

A. Yes, he did.

Q. Prior to May of 1998, would Mr. Hess have had the authority and the position to have caused him to interview five or six employees or employee applicants?

A. No, he would not.

Q. Would he have had the position, authority, or reason to reject anyone for employment?

A. He would not have that authority either.

Q. Did he at any time within your knowledge, interview five or six applicants and then come to you and make recommendations for their rejection?

A. No, he wouldn't.

Q. And he would not have had that authority to either interview or hire or reject; is that correct?

A. That's correct.[66]

---

[66] See Attachment 1, TT, Vol. IV, pp. 747-748.

Clearly, the claimed false testimony was subjected to ample impeachment at trial. Any material effect the alleged false testimony would have had on the opinion of the jury was negated by trial counsel's thorough impeachment. See Ventura, 794 So. 2d at 565.

Defendant's allegations of Brady violations involving this witness include the same three issues: 1) the time Mr. Hess saw the victim arrive; 2) his "interview" with Defendant; and 3) his identification of Defendant's car. Again, the first and third allegations fail because neither are sufficiently exculpatory nor impeaching to support a Brady violation. The second allegation fails because the record reflects that trial counsel obviously knew the scope of Mr. Hess's true responsibilities. Accordingly, Defendant has failed to meet his burden in demonstrating that either Giglio or Brady was violated as it pertains to Mr. Hess's statements and testimony, and he is not entitled to relief as to this claim.

7. Laura Ussery

Defendant further asserts that the State failed to disclose the existence of certain statements made by Laura Ussery. According to Defendant's allegations, Laura Ussery and Michael Williams ("M. Williams")[67] were best friends. Defendant alleges that, according to Investigator Nesmith's notes, M. Williams told Ussery about plans to rob and murder someone at the Popeye's and Taco Bell restaurants. Defendant alleges that the notes indicate that M. Williams informed Ussery that M. Williams intended to participate in the crime. Additionally, M. Williams allegedly told Ussery that his

---

[67] Michael Williams was a friend of Defendant's who testified at trial that Defendant confessed to him that he committed the murder. See Attachment 1, TT, Vol. II, pp. 320-322.

"friend didn't do it. The person arrested didn't do it." Defendant argues that this statement made by M. Williams to Ussery is contradictory to M. Williams's testimony at trial. Defendant alleges that Defendant's trial counsel was never informed by the State that these statements even existed, nor was defense counsel informed of the content of Ussery's statements. Specifically, Defendant alleges the State should have disclosed: 1) Ussery's general statements regarding M. Williams's previously planned involvement; and 2) the "exculpatory" statement made by M. Williams to Ussery that his "friend didn't do it. The person arrested didn't do it." Defendant alleges that he was prejudiced by this non-disclosure.

Regarding the first claim, the Court finds that no reasonable interpretation of the notes would indicate that M. Williams planned to be involved in the offense. The notes merely indicate that M. Williams had extensive knowledge of the planned crime and who was going to commit that crime. As to the second claim, the statement is not admissible as exculpatory evidence because it is obviously hearsay without exception. Although Defendant did not allege that the statement should have been disclosed as impeachment evidence, the Court finds that any such assertion would fail as a matter of law. The statement would not be proper impeachment under section 90.608, Florida Statutes, and would thus be inadmissible. The statement is not a prior inconsistent statement nor does it involve an inconsistent material fact.

Moreover, if the statement were considered proper impeachment, it still fails to satisfy the third element of Brady. The claim, if taken as true, would not reasonably undermine confidence in the verdict in light of the entire record and notes in question. As mentioned

above, the notes from the interview with Ussery indicate that M. Williams had extensive knowledge of the offenses and who was going to commit them. Further, the notes regarding M. Williams, his deposition, and his trial testimony are completely consistent. Coupled with the extensive evidence presented at trial (including the highly relevant testimony of Lee-Lee Smith), this alleged statement made to a co-worker that his "friend didn't do it. The person arrested didn't do it" would have had no substantive effect on the outcome of the trial. Defendant has failed to demonstrate that a Brady violation occurred as to Ussery's statements, and he is not entitled to relief as to this claim.

8. Willie Williams and Derrick Clarke

Willie Williams and Derrick Clarke were interviewed by Investigator Nesmith regarding the box cutter incident involving Defendant that occurred a few days before the victim was killed. Defendant alleges that the State withheld information regarding the make and model of Derrick Clarke's father's car. Admitting that the State provided the information in Investigator Nesmith's supplemental report, Defendant withdrew this claim. The Court wishes to further note that, in his deposition, Willie Williams also provided defense counsel with the information Defendant alleged was withheld by the State.[68]

9. Michael Williams

Michael Williams testified at trial that Defendant confessed to him that he had committed the crimes involved in the instant case.[69] Upon reviewing Investi-

---

[68] See Attachment 2, Deposition of Willie Williams, p. 6.

[69] See Attachment 1, TT, Vol. II, pp.320-322.

gator Nesmith's notes of his interview with M. Williams, Defendant claims that the State withheld three pieces of information vital to the defense: 1) Defendant told M. Williams, "I need to get my car fixed;" 2) Defendant would always do what Lee-Lee Smith wanted; and 3) Smith stated to M. Williams that "we got that motherfucker," referring to the murder. Defendant alleges that the State's failure to reveal these statements to Defendant's trial counsel constituted violations of Brady.

A review of the notes in light of the entire trial record indicates that a Brady violation did not occur regarding M. Williams's statement that Defendant "needed to get his car fixed." First, the statement has no impeachment value. Further, if the statement were exculpatory, the jury was provided at least six separate statements or witnesses that testified to Defendant's car trouble.[70] Therefore, Defendant has failed to allege sufficient prejudice as the purportedly withheld statement would have merely been cumulative evidence. See Routly v. State, 590 So. 2d 397, 399-400 (Fla. 1991) (State's suppression of critical exculpatory and impeachment evidence relating to key witness in capital murder prosecution was at most cumulative and thus would not have changed the outcome of trial; no Brady

---

[70] Specifically, testimony regarding Defendant's car troubles can be found during the examination of Lola Hurst (see Attachment 1, TT, Vol. IV, p. 779), Marie Hurst (see Attachment 1, TT, Vol. IV, pp. 783-785) Patti Hurst (see Attachment 1, TT, Vol. IV, pp. 788-789), Bertha Bradley (see Attachment 1, TT, Vol. V, pp. 794-795) and Timothy Lee Bradley (see Attachment 1, TT, Vol. V, pp. 804-805). Further, Defendant admitted to having car troubles in his tape-recorded statement which was played for the jury during the examination of Investigator Nesmith (see Attachment 1, TT, Vol. III, pp. 523-524).

violation occurred). The Court finds no merit to Defendant's claim that this fact coming from a "crucial state witness," as opposed to one of the six defense witnesses, would lend it some extraordinary weight. Having reviewed the entire record, the Court finds that such a statement, even if it had been relayed by M. Williams and suppressed by the State, would not have had any material effect on the outcome of the trial had it been disclosed.

As to the other two alleged Brady violations, the witness's deposition again conclusively refutes that any discovery violations occurred.[71] The witness clearly stated during his deposition that "whatever Lee-Lee said, Tim would do even though Tim was older."[72] M. Williams also stated that Lee-Lee Smith made incriminating statements such as "I did it, I did it," or something to that effect.[73] These statements during the deposition are substantially similar to the information Defendant now alleges was withheld by the State. Therefore, the Court finds that this claim is also without merit. Defendant has failed to demonstrate that a Brady violation occurred as to M. Williams's statements, and he is not entitled to relief as to this claim.

10. Ineffective Assistance of Counsel

As to all of Defendant's Brady and Giglio claims alleged in the original motion, Defendant alleges that "[t]o the extent the above detailed evidence was avail-

---

[71] See Attachment 3, Deposition of Michael Williams, pp. 21-25.

[72] See Attachment 3, Deposition of Michael Williams, p. 25.

[73] See Attachment 3, Deposition of Michael Williams, pp. 21-22.

able to counsel, counsel should have discovered and presented evidence. Failing to do so, if such a failure occurred, was ineffective assistance of counsel." Defendant's allegation is legally insufficient; therefore, he is not entitled to relief as to this claim.

II. NEWLY DISCOVERED EVIDENCE

Defendant alleges that his conviction and death sentence are materially unreliable because of newly discovered evidence unavailable at the time of his trial. Specifically, Defendant contends that his conviction and sentence should be vacated and set aside based upon the following: 1) Anthony Williams's recent recantation of his trial testimony; 2) Edison Sartes's statement that Willie Griffin's testimony at trial was false; 3) Lee-Lee Smith being charged as a "co-defendant" with accessory after the fact after Defendant's trial was complete; 4) Carl Hess's recantation of his trial testimony; 5) discovery that Carl Hess had an inappropriate conversation with another witness during trial; and 6) Willie Griffin's recent recantation of his trial testimony.

> Two requirements must be met in order for a conviction to be set aside on the basis of newly discovered evidence. First, in order to be considered newly discovered, the evidence "must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known [of it] by the use of diligence." Torres-Arboleda v. Dugger, 636 So. 2d 1321, 1324-25 (Fla. 1994).
>
> Second, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial. To reach this conclusion the trial court is required to "consider all newly

> discovered evidence which would be admissible" at trial and then evaluate the "weight of both the newly discovered evidence and the evidence which was introduced at the trial." Jones v. State, 709 So. 2d 512, 521 (Fla. 1998).

Robinson v. State, 865 So. 2d 1259, 1262 (Fla. 2004).

With these requirements in mind, the Court will address Defendant's newly discovered evidence claims.

1. Anthony Williams

At Defendant's trial, Anthony Williams testified that Defendant told him about participating in the murder of the victim.[74] Defendant alleges that A. Williams now claims that his trial testimony was a complete fabrication based upon promises made to him by the prosecutor. Additionally, Defendant alleges that inmate Willie Griffin informed A. Williams that Defendant did not confess to Griffin that he had committed the murder, contrary to Griffin's trial testimony.

A. Williams testified at evidentiary hearing that his deposition and trial testimony were false.[75] As previously discussed, recanted testimony is exceedingly unreliable. See Armstrong, 642 So. 2d at 735. In hearing the testimony of A. Williams at evidentiary hearing, and reviewing A. Williams's previous deposition and trial testimony, the Court finds, as detailed above, that A. Williams's evidentiary hearing testimony is not credible. In addition, A. Williams's evidentiary hearing testimony, when weighed with the other evidence adduced at Defendant's trial, would not have changed the outcome of Defendant's trial.

---

[74] See Attachment 1, TT, Vol. II, pp. 356-358.

[75] See EHT, Vol. II, pp. 274-275; 289-293.

In regard to the allegation that Willie Griffin's trial testimony was false, A. Williams testified at evidentiary hearing that Griffin informed him that Griffin expected help from the State in exchange for his testimony.[76] Williams did not offer any testimony which would directly support Defendant's allegation that Griffin testified falsely at trial. The Court notes that the evidentiary hearing testimony offered by A. Williams regarding the substance of his conversations with Griffin is hearsay and not competent evidence on which to base any judicial determination. See § 90.804, Fla. Stat.; see generally, Dailey v. State, No. SC05-1512, 32 Fla. L. Weekly S293, 2007 WL 1556674, at *4 (Fla. May 31, 2007); Kokal v. State, 901 So. 2d 766, 775-776 (Fla. 2005). As there is no competent "newly discovered evidence" before the Court on this issue, Defendant's claim must fail.

2. Edison Sartes

Defendant claims inmate A. Williams spoke with inmate Edison Sartes and told Sartes that A. Williams was "going to sink" Defendant by testifying at Defendant's trial. Defendant also alleges that Sartes saw A. Williams reading Defendant's legal papers. Additionally, Defendant alleges that inmate Willie Griffin informed Sartes that Griffin wanted to "jump on" Defendant's case. Defendant asserts that the jury relied heavily upon the trial testimony of Willie Griffin, especially on the subject of Defendant's lack of remorse. Defendant contends that had the jury known that Griffin fabricated his trial testimony, it would have changed the outcome of Defendant's case.

---

[76] See EHT, Vol. II, p. 276.

Defendant failed to present evidence regarding this claim at evidentiary hearing. With no evidence before this Court to support the allegation, Defendant's claim must fail. Defendant is not entitled to relief on this basis.

3. Lee-Lee Smith as co-defendant

Defendant alleges that it was not discovered until after trial that Lee-Lee Smith was actually a "co-defendant." According to testimony adduced at evidentiary hearing, and the record in Smith's case, Smith was charged after the completion of Defendant's trial as an accessory after the fact.[77] Smith's case was transferred to juvenile court; he entered a plea as a juvenile delinquent, and was adjudicated guilty.[78] Defendant argues that if the jury had known that Smith was Defendant's co-defendant and had been convicted in the instant case, they would have scrutinized Smith's testimony more closely, and the outcome of Defendant's trial would have been different.

The court concludes that, had the jury known that Lee-Lee Smith had been found guilty as an accessory after the fact, it is quite likely that the jury may have given Smith's trial testimony even ***more*** weight. The fact that Smith would have already been found guilty of assisting Defendant with the murder after the fact would have likely reinforced the content of his testimony. The Court finds that Smith's charge and conviction for accessory after the fact would have done little to

---

[77] See EHT, Vol. II, pp. 335-336; see also information in Lee-Lee Smith's case 00-2078.

[78] See EHT, Vol. IV, pp. 690; 704-706; see also court docket in case 00-2078.

change the outcome of Defendant's trial. Defendant is not entitled to relief as to this claim.

4. and 5. Carl Hess

Defendant alleges that it is "newly discovered evidence" that Carl Hess now admits that he never interviewed Defendant for a job. Defendant claims that this information renders Hess's credibility "crippled," and that the concession that he did not interview Defendant taints "every other aspect" of Hess's testimony. Defendant also alleges that Hess spoke with another witness inappropriately during trial after the rule of sequestration had been invoked by the parties.

The allegation that Carl Hess did not interview Defendant is not "newly discovered." Trial counsel for Defendant fully explored during trial Hess's "manager trainee" position at Wendy's,[79] and his limited role concerning interviewing job applicants.[80] In fact, the defense even called the Wendy's manager Sun Nguyen to testify that Hess did not interview candidates or make hiring decisions regarding employees.[81] Hess himself testified at trial that he did not make hiring decisions.[82] The jury was able to hear all of this testimony at trial and determine how much weight to give Hess's trial testimony. Defendant has failed to demonstrate that this information is "newly discovered," and he is not entitled to relief on this basis.

---

[79] See Attachment 1, TT, Vol. II, pp. 303-304; Vol. IV, pp. 747-748.

[80] See Attachment 1, TT, Vol. II, pp. 307-312; Vol. IV, pp. 746-748; Vol. V, pp. 876-877.

[81] See Attachment 1, TT, Vol. IV, p. 749.

[82] See Attachment 1, TT, Vol. II, pp. 311-312.

As to Defendant's allegation that Hess participated in inappropriate conversations with another witness, Defendant failed to provide any evidence on this claim at the evidentiary hearing. With no competent evidence presented to support this claim, Defendant's allegation must fail. Defendant is not entitled to relief as to this claim.

6. Willie Griffin

In Defendant's third supplemental motion, he alleges that Willie Griffin has now recanted his trial testimony. Willie Griffin was one of many "jailhouse snitches" who offered testimony at Defendant's trial that Defendant had confessed to the murder.[83]

Initially, the Court granted an evidentiary hearing as to this claim.[84] Subsequently, difficulties arose in procuring Griffin's presence at the hearing. Specifically, Griffin is a federal prisoner in Fort Dix, New Jersey, and is outside of the subpoena power of this Court.[85] On February 6, 2006, Defendant obtained a certification of materiality for out-of-state witness from this Court so that Defendant's postconviction counsel could invoke the subpoena power of the appropriate court in New Jersey pursuant to section 942.03, Florida Statutes.[86] However, upon further research, Defendant's counsel represented to this Court that because Griffin is a fed-

---

[83] See Attachment 1, TT, Vol. II, pp. 363-370.

[84] See Attachment 4, "Order Defining Scope of Continued Evidentiary Hearing," February 3, 2006.

[85] See Attachment 5 "Motion for Certification of Materiality for Out-of-State Witness," February 1, 2006.

[86] See Attachment 6, "Certification of Materiality for Out-of-State Witness," February 6, 2006.

eral prisoner, Defendant could not subpoena Griffin pursuant to section 942.03, Florida Statutes, as once thought. Defendant's postconviction counsel asserted that the only way he would be able to obtain Griffin's presence for the evidentiary hearing was if the State would submit paperwork pursuant to the Interstate Act of Detainers. The State objected to accepting responsibility for procurement of Defendant's witness. Defendant then filed a motion to perpetuate Griffin's testimony, or in the alternative, to compel the State to assist Defendant in procuring Griffin.[87] The State filed its objections.[88]

The Court denied Defendant's motion regarding the perpetuation of Griffin's testimony for several reasons. First, Defendant failed to specifically allege, or attach documentation, regarding the purported content of Griffin's testimony. This Court concludes that perpetuation was not justified in light of the speculative nature of Defendant's pleading. Additionally, this Court is not convinced that Griffin could have been held accountable for his proposed deposition testimony. While the Court does not assume that Griffin would have necessarily been motivated to testify falsely, there is also no suggestion that Griffin would have been motivated to tell the truth, as he would not have been properly subject to potential perjury charges. As to

---

[87] See Attachment 7, "Affidavit and Motion to take Deposition to Perpetuate Testimony or, in the Alternative, to Compel the State of Florida to Assist in Procurement of Witness Attendance," February 27, 2006.

[88] See Attachment 8, "Suggestions in Opposition to Defendant's 'Affidavit and Motion to Take Deposition to Perpetuate Testimony or, in the Alternative, to Compel the State of Florida to Assist in Procurement of Witness Attendance," March 3, 2006.

Defendant's suggested alternative of compelling the State's assistance in procuring Griffin, this Court agrees with the State that it should not have to be responsible for retrieving Defendant's witnesses. The Court finds that the State's participation in obtaining Griffin's presence before this Court would have amounted to more than a "ministerial act." Consequently, Defendant's motion to perpetuate testimony was denied in its entirety.[89]

As this claim now stands, the Court has nothing but the bare allegations of Defendant to support this claim. Defendant has failed to present any reliable admissible evidence regarding the recantation of Griffin.[90] Consequently, Defendant's claim must fail.

7. Ineffective Assistance of Counsel

As to all of the newly discovered evidence claims alleged in Defendant's original motion, Defendant alleges that "[t]o the extent the above detailed evidence was available to counsel, counsel should have discovered and presented evidence. Failing to do so, if such a failure a occurred, was ineffective assistance of counsel." Defendant's allegation is legally insufficient; therefore, he is not entitled to relief as to this claim.

---

[89] See Attachment 9, "Order on Status Conference Held April 28, 2006.

[90] Defendant attempted to supply the affidavit of Griffin, and proposed that testimony from postconviction counsel for Defendant, and counsel's investigator would be admissible evidence regarding this claim. However, this Court found the affidavit and the proposed testimony of counsel and the investigator to be inadmissible as hearsay. See Attachment 10, Order denying Defendants proffer of evidence, vacating and setting aside order granting evidentiary hearing, and setting closing arguments, February 28, 2007.

III. INEFFECTIVE ASSISTANCE OF COUNSEL DURING THE GUILT PHASE OF TRIAL

Defendant alleges that his trial counsel rendered ineffective assistance during the guilt phase of trial based upon the following: 1) counsel failed to utilize police reports to rebut the State's "false" presentation of evidence regarding Defendant's statement about Wal-Mart; 2) counsel failed to discover and present the testimony of Andrew Salter at trial; 3) counsel failed to present the testimony of Brett Pleasant at trial; 4) counsel failed to object to the evidence and the State's inappropriate argument regarding Defendant's lack of remorse; 5) counsel failed to move for a mistrial based upon an emotional display from the victim's family; and 6) counsel failed to move for a mistrial based upon the evidence admitted regarding the physical abnormalities of the victim.

> In order to prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that the deficient performance prejudiced the defendant so as to deprive him of a fair trial. See Strickland v. Washington; see also Wiggins v. Smith, 539 U.S. 510, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003) (reaffirming the Strickland two-prong analysis for claims of ineffective assistance of counsel). In reviewing counsel's performance the court must be highly deferential to counsel, and in assessing the performance every effort must "be made to eliminate the distorting effects of hindsight to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689, 104 S. Ct. 2052; see also Rivera v.

> Dugger, 629 So. 2d 105, 107 (Fla. 1993). As to the first prong, the defendant must establish that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S. at 687, 104 S. Ct. 2052; see also Cherry v State, 659 So. 2d 1069, 1072 (Fla.1995). For the prejudice prong, the reviewing court must determine whether there is a reasonable probability that but for the deficiency, the result of the proceeding would have been different. See Strickland, 466 U.S. at 694, 104 S. Ct. 2052; see also Valle v. State, 705 So. 2d 1331, 1333 (Fla. 1997). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694, 104 S. Ct. 2052. "Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." Strickland, 466 U.S. at 687, 104 S. Ct. 2052.

Walls v. State, 926 So. 2d 1156, 1164-65 (Fla. 2006).

With these principles in mind, the Court will address Defendant's claims of ineffective assistance of counsel during the guilt phase of trial.

1. Wal-Mart

Defendant alleges that trial counsel was ineffective in failing to rebut the evidence and argument submitted by the State that Defendant did not inform law en-

forcement that he went to Wal-Mart on the day of the murder.[91]

Trial counsel's evidentiary hearing testimony demonstrates that counsel made a strategic decision in not attempting to impeach the evidence and argument presented regarding Wal-Mart.[92] The Court finds counsel's strategy reasonable. Consequently, Defendant has failed to meet his burden as espoused in Strickland, and he is not entitled to relief as to this claim.

2. Andrew Salter

Defendant alleges that Andrew Salter is the "suspicious" unidentified person that witness Rochelle Tingler saw the morning of the murder.[93] She reported Salter's presence to law enforcement at the scene.[94]

Defendant alleges that even though counsel was aware that Salter might be a possible witness via discovery, he failed to interview Salter. Defendant contends that if counsel had interviewed Salter, he would have discovered "exculpatory" information. According to Defendant, Salter would have testified that he was in the Popeye's parking lot at approximately 7:30 a.m. to

---

[91] The Court acknowledges that the legal sufficiency of this claim is questionable. However, within the context of his Giglio claim based upon this same issue, Defendant alleged that the evidence and argument introduced on this subject prejudiced Defendant. Consequently, the Court will construe this claim as legally sufficient and address it upon its merits.

[92] See EHT, Vol. I, pp. 21-36.

[93] Laura Rochelle Tingler was one of the ladies from the hair salon who testified regarding the unidentified person. See Attachment 1, TT, Vol. IV, pp. 720-724.

[94] See Attachment 1, TT, Vol. IV, pp. 722-723.

8:00 a.m. on May 2, 1998. Salter observed the victim's Toyota Tercel in the parking lot, Carl Hess in the Wendy's parking lot, and witnessed Anthony Brown, a Popeye's employee, knock on the door of Popeye's. Later, Salter observed Raymond Curtis, the delivery truck driver, park behind the Popeye's restaurant. However, Salter did not observe Defendant or his vehicle at the Popeye's restaurant. Defendant alleges that Salter's testimony would have been "crucially important" in refuting Hess's testimony that Defendant and his vehicle were at the Popeye's on the morning of May 2, 1998.

Salter's evidentiary hearing testimony does not support Defendant's allegations. Salter testified at evidentiary hearing that he woke up at 5:30 a.m., left the trailer park located behind the West Florida Motel, and walked to the Wendy's restaurant to await a ride to work.[95] According to Salter's evidentiary hearing testimony, he ***did not*** observe any vehicles or persons, including Popeye's employees, in the Popeye's parking lot that morning.[96] Salter also testified that he was not sure if he had seen the Wendy's employee (Hess) that morning; he stated that he thought he saw somebody from Wendy's take out the trash.[97] Salter also testified that he left the area to go home and eat, but that he was still hungry, and decided to walk to Winn-Dixie,[98] "maybe a two-and-a-half-minute walk" from Popeye's.[99] Salter estimated that he was "probably" in the Winn-

---

[95] See EHT, Vol. II, pp. 340-341.

[96] See EHT, Vol. II, pp. 342-343.

[97] See EHT Vol. II, pp. 344.

[98] See EHT Vol. II, pp. 342.

[99] See EHT, Vol. II, p. 346.

Dixie less than 10 to 15 minutes.[100] Salter remembered seeing the delivery truck driver at the back of the Popeye's restaurant, but could not be sure if the delivery truck arrived before he went into Winn-Dixie, or if he saw it at the back of the restaurant after he left the grocery store.[101] Additionally, while Salter testified that the Popeye's was in his "eye-view," Salter was unable to say that he was watching the Popeye's very carefully between the hours of 7:00 a.m. to 8:20 a.m.[102] When asked whether Salter was in the parking lot for an hour and a half to two hours, Salter responded, "[y]es. Sitting over by the Wendy's, maybe an hour and a half, perhaps. I'm not sure."[103] The Court finds that this testimony would not have exonerated Defendant at trial.

Additionally, trial counsel testified at evidentiary hearing that he made the strategic decision not to locate and interview Andrew Salter. At evidentiary hearing, trial counsel stated, "[f]or some period of time I made serious efforts to try to find out who the guy was [that the ladies from the beauty shop had seen that, morning] and was unsuccessful.. But then, frankly, it became, in my opinion, an advantage not to know who he was and to simply argue that he was a strange, suspicious black guy out there on a place, and I inferred that it was earlier than it really was, and it give [sic] me an out, which supported my theory and argument in the case."[104] "[D]efense counsel's strategic

---

[100] See EHT, Vol. II, p. 346.

[101] See EHT, Vol. II, p. 342; 346-347.

[102] See EHT, Vol. II, p. 348.

[103] See EHT, Vol. II, p. 349.

[104] See EHT, Vol. I, p. 45.

choices do not constitute deficient conduct if alternative courses of action have been considered and rejected." Spencer, 842 So. 2d at 62. The Court finds that counsel investigated other courses of action, but ultimately decided that it was in the best interest of his client if he did not locate and interview Andrew Salter. The Court finds this to be a reasonable strategy and further finds that Defendant has failed to demonstrate that he was prejudiced by his counsel's action or that he was prejudiced by the absence of Salter's testimony at trial. Defendant is therefore not entitled to relief as to this claim.

3. Brett Pleasant

Defendant alleges that counsel was ineffective in failing to secure the testimony of Brett Pleasant at Defendant's trial. According to the instant motion, Pleasant was an inmate at the Escambia County Jail at the same time as Anthony Williams. Purportedly, Anthony Williams admitted to Pleasant that he was going to give false testimony at trial against Defendant.

Defendant alleges that even though trial counsel was aware of Pleasant and the substance of his purported testimony, counsel did not subpoena Pleasant and thereby was ineffective in failing to secure Pleasant's testimony at trial. When Pleasant became unavailable, discussions were held outside the presence of the jury as to whether Pleasant's testimony would be admissible.[105] The trial court ruled that the purported testimony would be considered inadmissible hearsay.[106] Defendant further argues that counsel was ineffective

---

[105] See Attachment 1, TT, Vol. IV, pp. 684-690.

[106] See Attachment 1, TT, Vol. IV, pp. 688-690.

for abandoning Pleasant as a witness based upon the trial court's ruling.

The trial record demonstrates that while trial counsel did not subpoena Pleasant, he did request, and the trial court entered, a court order to transport Pleasant so that he would be available to testify at Defendant's trial.[107] Even though Pleasant appears to have been mistakenly transported instead to the Department of Corrections during the trial, contrary to the order of the trial court, Defendant has failed to demonstrate how counsel's actions in obtaining a direct order from the court was deficient. The Court doubts that a defense subpoena would have prevented Pleasant from being mistakenly transported. Defendant has failed to meet his burden under Strickland, and he is not entitled to relief as to this claim.

As to Defendant's allegation that counsel was ineffective in "abandoning" Pleasant's testimony based on the Court's ruling, the Court notes that Pleasant did not testify at the evidentiary hearing; therefore this Court is left without any competent evidence proving that Pleasant's testimony would have been admissible or would have contained the substance alleged by Defendant. At trial, reference was made to a letter purportedly written by Pleasant to Defendant about someone "lying on" Defendant, but Anthony Williams's name was not mentioned. According to the record, the letter specifically provided, "Big Jet told me about this cat man who is testifying in your case. I have never talked to you about your case, but if the nigger is trying to sink you, Tim, you can use me as a witness, that he was telling me he was lying to get some cases off of

---

[107] See Attachment 1, TT, Vol. IV, pp. 684-685.

him."[108] Neither the prosecution nor defense counsel were able to discover the identity of the "Big Jet" or "cat man" referred to in the letter.[109] Based upon this excerpt of the letter, the Court found that even if Pleasant had been transported to court, his testimony would be considered inadmissible hearsay.[110]

At evidentiary hearing, trial counsel testified that he was aware Pleasant's testimony at trial would have consisted of hearsay, but that he had hoped to elicit some of the substance of Pleasant's testimony before the State objected.[111] Counsel decided that it was not worth the risk of aggravating the jury by making them wait for a witness who would only be on the stand for a moment, when counsel already thought the jury was going to find in Defendant's favor.[112] The Court finds that trial counsel exercised sound strategy when making this decision. Accordingly, Defendant has failed to demonstrate that Pleasant's testimony would have been admissible at trial, or that his counsel was deficient in failing to pursue Pleasant's testimony. Defendant is not entitled to relief as to this claim.

4. Failure to object - Lack of remorse

Defendant further alleges that counsel was ineffective for failure to object to the State's inappropriate evidence and closing argument regarding Defendant's lack of remorse. Defendant contends that it is well-

---

[108] See Attachment 1, TT, Vol. IV, pp. 688-689.

[109] See Attachment 1, TT, Vol. IV, pp. 689-690.

[110] See Attachment 1, TT, Vol. IV, pp. 688-690.

[111] See EHT, Vol. I, p. 50.

[112] See EHT, Vol, I, p. 51.

settled that lack of remorse is an inappropriate non-statutory aggravating factor. Defendant alleges that if counsel had objected to this evidence and argument, the issue would have been preserved for appeal where "relief would have resulted."

The evidence to which Defendant refers is Willie Griffin's trial testimony. During trial, the following interchange occurred between the prosecutor and Mr. Griffin:

> Q. [By Mr. Rimmer] During the time you were incarcerated in the Escambia County Jail with Timothy Hurst, did he ever tell you about the murder case he's charged with at Popeye's?
>
> A. [By Mr. Griffin] Yes, sir.
>
> Q. What did he say about it?
>
> A. We got into a conversation about it, I asked him, you know, did he have any remorse or anything about it, you know, as far as, you know, him being in that incident, as I just said, "Do you dream about it? Do you even think about it, you know?" and he said, "I did that swine, and 'F' the rest of them."
>
> Q. Did he say why he did it?
>
> A. He didn't say why. He just basically said, "I did that, and I don't care nothing about the rest of it."[113]

During cross-examination, trial counsel for Defendant inquired:

---

[113] See Attachment 1, TT, Vol. II, pp. 364-365.

Q: You went up and said, "Do you have any remorse? That was your question?

A. No. We were in our cell. Because his best friend was my roommate, and he got into an argument with my roommate so he started talking to me; and I said, "You know, how do you really feel about that?"[114]

Defense counsel also asked Griffin about a letter he wrote to Investigator Nesmith and questioned Griffin's motives for testifying against Defendant.[115]

On redirect, the prosecutor questioned Griffin further about his motivation for testifying. Griffin explained further:

Q: In that letter that you wrote to Investigator Nesmith, did you tell him why you were willing to testify?

A: Yes, sir.

Q: What was the reason you listed in your letter?

A. I said that I just couldn't understand how a person could kill somebody and just have no remorse, period.[116]

Defendant has failed to demonstrate that if trial counsel had objected to Griffin's testimony, this Court would have sustained the objection, or Defendant would have been granted relief on appeal. The content of Griffin's testimony was a combination of Defendant's own words (admissible as a hearsay exception of admis-

---

[114] See Attachment 1, TT, Vol. II, p. 369.

[115] See Attachment 1, TT, Vol. II, pp. 367-370.

[116] See Attachment 1, TT, Vol. II, p. 370.

sion by a party-opponent), and Griffin's reaction to Defendant's words which formed the motive for Griffin testifying (admissible as declarant's then-existing mental condition). Griffin's testimony regarding lack of remorse was not elicited by the State in an attempt to introduce a non-statutory aggravating circumstance; Griffin's statement about remorse was simply an explanation as to why he agreed to testify against Defendant. Consequently, Defendant has failed to demonstrate that counsel acted deficiently in failing to object to Griffin's testimony, and he is not entitled to relief as to this claim.

During closing arguments, the prosecutor summarized Willie Griffin's testimony:

> [By Mr. Rimmer] Remember the testimony of the other inmate, Willie Griffin. Willie Griffin told you something very interesting. He told you that Hurst said yeah, I did that swine. Griffin said I couldn't understand how he could say that. I couldn't understand how he could not show any remorse for it whatsoever."[117]

During defense counsel's argument, he highlighted the possible ill-motives behind the inmates' testimony in the instant case.[118] In response, the prosecutor argued the following, based upon the inmates' testimony:

> [By Mr. Rimmer] There's been no testimony that these inmates have tried to get a reduction in their sentence. As a matter of fact, you might recall Griffin testified the reason he came forward, and he wrote it in his letter and

---

[117] See Attachment 1, TT, Vol. V, pp. 841-842.

[118] See Attachment 1, TT, Vol. V, pp. 888-889.

> I showed it to him, when the defense attorney was cross-examining him and trying to suggest his motive was to reduce his sentence. He said in his letter the reason he was coming forward was because Hurst showed no remorse. That's the reason he was coming forward.[119]

Trial counsel explained at evidentiary hearing his strategy in not lodging an objection regarding the prosecutor's argument based on Griffin's testimony:

> "It's a double-edge blade. We've got vivid photographs of the child here in the courtroom, and the question as to whether to attack Rimmer for saying that – basically, it's a lack of remorse thing. That's what we're getting to. Well, that, in fact, is what the witness testified to. I didn't want to reemphasize and have that heard over and over and over and over again. . . ."[120]

It is evident from trial counsel's explanation that counsel's decision not to object to the State's closing argument regarding Defendant's lack of remorse was strategic. The Court also notes that even if trial counsel had objected to the prosecutor's argument, the outcome of Defendant's trial and/or appeal would not have been different. See Walls v. State, 926 So. 2d 1156, 1166-67 (Fla. 2006) (prosecutor's comments regarding lack of remorse made in response to a defense tactic were not improper). Defendant has failed to meet his burden under Strickland, and he is not entitled to relief on this basis.

---

[119] See Attachment 1, TT, Vol. V, p. 893.

[120] See EHT, Vol. I, p. 58.

5. Failure to move for mistrial - Emotional outburst

Defendant next argues that trial counsel was ineffective in failing to move for mistrial based upon the emotional outburst that occurred in the courtroom in the jury's presence. Defendant alleges that during the testimony of Agent Johnson, the family displayed "obvious outbursts of emotion." Trial counsel brought the outburst to the trial court's attention, but failed to move for mistrial. Defendant alleges that if trial counsel had moved for mistrial on this basis, the trial court would have granted a mistrial, or the issue regarding the mistrial would have been preserved for appellate review.

At evidentiary hearing, trial counsel testified regarding this issue. Trial counsel testified that it was "not a per se emotional display," contrary to Defendant's allegations.[121] Trial counsel explained what actually happened:

> We were in the midst of something that was touchy, and I think it may have been review of the cut marks or photographs, okay? I observed one of the persons in the audience crying and another one attending to her, okay? Before the jury had an opportunity to become aware of that, I thought I approached the bench and told Joe – or told the judge that there was a display and it needed to be handled before it got to the point that the jury became aware of it. I thought that I handled it properly. At the time the judge instructed the jury to leave the room. To my knowledge, they were

---

[121] See EHT, Vol. I, p. 55.

never actually aware of what took place, and I thought it was properly handled.[122]

Defense counsel explained that he did not move for a mistrial because he did not believe that the jury had been influenced by the persons in the audience, and therefore he did not see any grounds for a mistrial. Defense counsel also testified at that point in the proceedings, he thought he "had the case in a bag." The Court finds that trial counsel's memory regarding this incident coincides with the trial transcript.[123] Accordingly, Defendant has failed to demonstrate that his counsel acted deficiently, or that he suffered any prejudice by counsel not moving for a mistrial. Defendant is not entitled to relief as to this claim.

6. Failure to move for mistrial – comments regarding victim's physical abnormalities

Defendant further argues that trial counsel rendered ineffective assistance of counsel in failing to move for mistrial based upon the evidence and comments made regarding the victim's physical abnormalities. In Defendant's motion, he specifically references the evidence submitted by Griffin, the medical examiner, and the State's argument describing the appearance of the victim. Defendant argues that the victim's abnormalities were irrelevant to the issue of determining Defendant's guilt or to the medical testimony. Defendant contends that trial counsel should have moved *in limine* to keep references to the victim's abnormalities out of evidence, or he should have objected to the testimony as being an "obvious play for sympathy."

---

[122] See EHT, Vol. I, pp. 55-56.

[123] See Attachment 1, TT, Vol. II, pp. 262-265.

At evidentiary hearing, trial counsel testified that he did not object to Griffin's testimony because Griffin's knowledge of the victim's condition was intertwined with his testimony regarding Defendant's confession.[124] According to Griffin's trial testimony, Defendant described the victim's physical abnormalities during his confession to Griffin.[125] Trial counsel further explained at evidentiary hearing that he did not object to the medical examiner's testimony simply describing what he saw. Defense counsel admitted that he could have objected "50 times" throughout the course of trial but chose not to; in this situation, objecting would have drawn further attention to the fact that the victim had physical abnormalities. Even though trial counsel did not testify at evidentiary hearing regarding the State's closing argument commenting on this topic, the Court finds that the prosecutor's argument regarding the victim's obvious physical abnormalities was based upon the evidence presented and was proper; an objection would have been overruled. Counsel's decision not to object to this evidence and argument was clearly a strategic decision. Defendant has therefore failed to demonstrate how counsel was ineffective for failure to either move for mistrial, object, or file a motion *in limine* regarding evidence and argument about the victim's appearance, and has also failed to demonstrate that he was prejudiced by this information coming before the jury. Defendant is not entitled to relief as to this claim.

---

[124] See EHT, Vol. I, pp. 57-59.

[125] See Attachment 1, TT, Vol. II, p. 365.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL DURING THE PENALTY PHASE

Defendant further alleges that trial counsel rendered ineffective assistance of counsel during the penalty phase because counsel failed to present "lay witness" and mental health mitigation.

> Under Strickland, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Marshall v. State, 854 So. 2d 1235, 1247 (Fla. 2003) (quoting, Strickland, 466 U.S. at 691) see also Caroll v. State, 815 So. 2d 601, 614-615 (Fla. 2002) (same). [The Florida Supreme Court] has stated:
>
> In evaluating claims that counsel was ineffective for failing to present mitigating evidence . . . [t]he principal concern is not whether a case was made for mitigation but whether the "investigation supporting counsel's decision not to introduce mitigating evidence . . . was itself reasonable" from counsel's perspective at the time the decision was made.
>
> Holland v. State, 916 So. 2d 750, 757 (Fla. 2005) (quoting Wiggins v. Smith, 539 U.S. 510, 523 (2003)), cert. denied, 126 S. Ct. 1790 (2006). "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Wiggins v. Smith, 539 U.S. 510, 521 (quoting Strickland v. Washington, 466 U.S. 668, 690-691

> (1984)). "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Id. at 521-22 (quoting Strickland, 466 U.S. at 691).

Willacy v. State, No. SC05-189, 32 Fla. L. Weekly S377, 2007 WL 1836848 at * 7 (Fla. June 28, 2007).

> In assessing prejudice, [the court should] reweigh the evidence in aggravation against the totality of the mental health mitigation presented during the postconviction evidentiary hearing to determine if [the court's] confidence in the outcome of the penalty phase trial is undermined. See Rutherford v. State, 727 So. 2d 216, 223 (Fla. 1998) (stating that in assessing prejudice "it is important to focus on the nature of the mental mitigation" now presented); see also Wiggins, 539 U.S. at 534 ("In assessing prejudice, we reweigh the evidence in aggravation against the totality of available mitigating evidence").

Hannon v. State, 941 So. 2d 1109, 1134 (Fla. 2006).

With these principles in mind, the Court will address Defendant's claims of ineffective assistance of counsel alleged to have occurred during the penalty phase.

1. Lay witness mitigation

Defendant alleges that trial counsel presented an "anesthetized version" of Defendant's life, "virtually devoid of the reality as it existed." Defendant alleges that if counsel had presented full information regarding Defendant's life history, the jury "would have been informed of powerful non-statutory mitigation," and that

such information would have lent "strong support to mental health mitigation." Defendant claims that counsel's failure to present Defendant's full life history was unreasonable.

Trial counsel testified that he and two other people spoke with family members, a preacher, and some teachers in preparation for the penalty phase of trial.[126] Trial counsel decided that it would be too risky to present the testimony of a teacher as mitigation, because he feared the State would have called another teacher to counter the testimony.[127] Trial counsel also stated that he considered presenting information regarding Defendant's mother's abuse of drugs and alcohol while she was pregnant with Defendant, but decided this testimony would not be worthwhile, as the theory of fetal alcohol syndrome was too difficult to prove.[128] Instead of presenting evidence of Defendant's "bad history" involving his family life, counsel "weeded out that stuff and consciously decided to emphasize the good parts of Defendant's life: his relationship with his father, other family members, church associates, and people in the community.[129] Ultimately, trial counsel chose to present only three lay witnesses: Defendant's mother, father, and sister. All three testified that Defendant was "slower" than other persons his age, and that he was a good person.[130] The Court finds that counsel made reasonable investigations into possible mitigation evi-

---

[126] See EHT, Vol. I, pp. 82 & 86.

[127] See EHT, Vol. I, p. 86.

[128] See EHT, Vol. I, pp. 84-85.

[129] See EHT, Vol. I, p. 84.

[130] See Attachment 1, TT, Vol. V, pp. 970-982.

dence, and made a sound strategic choice regarding the evidence to present in mitigation.

At evidentiary hearing, the only other lay witness mitigation presented by Defendant to support his claim was that of Danny Burk, the administrative dean of students at Tate High School.[131] Burk testified that Defendant treated Burk with respect,[132] Defendant loved basketball,[133] and Defendant was "real quiet," "was not a very brilliant person," and "wasn't going to be on the dean's list at school, by [sic] he wasn't a stupid kid, either."[134] The Court fails to see how this additional lay witness mitigation, coupled with the lay witness mitigation presented at trial, would have outweighed the evidence in aggravation.[135] Defendant has failed to meet his burden as to this claim, and he is not entitled to relief.

---

[131] See EHT, Vol. III, pp. 502-509.

[132] See EHT, Vol. III, p. 504.

[133] See EHT, Vol. III, pp. 504-505.

[134] See EHT, Vol. III, p. 505.

[135] The trial court found three aggravating cicumstances which it gave great weight: 1) the murder was committed by a person engaged in commission of a robbery; 2) the murder was especially heinous, atrocious, and cruel (HAC); and 3) the murder was committed for the purpose of avoiding or preventing lawful arrest. On direct appeal, the Florida Supreme Court found that it was error for the trial court to find the third aggravating circumstance based upon evidence presented. However, when comparing the remaining aggravating circumstances which were given great weight to the mitigating evidence, the Florida Supreme Court found that the error was harmless. See Hurst v. State, 819 So. 2d 689, 694-697 (Fla. 2002).

2. Expert Mental Health Testimony regarding Mitigation

Defendant further alleges that counsel was ineffective during the penalty phase by failing to have Defendant evaluated by a professional mental health expert, and by failing to present the testimony of a mental health expert as mitigation to the jury during the penalty phase and to the judge during the Spencer hearing. Defendant alleges that counsel's failure to adequately investigate mental health mitigation was not based upon informed judgment but on "ignorance" and "neglect." Defendant further alleges that a mental health expert would have found mitigation, and that in fact, Defendant has now been examined by a mental health expert and both statutory and non-statutory mitigation is available for the Court's consideration. Defendant asserts that his sentence of death should not be permitted to stand.

Initially, the Office of the Public Defender represented Defendant in the instant case. A motion for appointment of a mental health expert was filed by an assistant public defender before Mr. Arnold, Defendant's trial counsel, began representing Defendant. During the pre-trial hearing regarding the motion for appointment of a mental health expert, Mr. Arnold expressed his opinion that the appointment was not necessary; consequently, Defendant's motion for appointment of mental health expert was denied.

Trial counsel testified at evidentiary hearing that he spoke with Defendant and Defendant's mother about the possibility of having Defendant evaluated by a psychologist or a psychiatrist.[136] Defendant informed

---

[136] See EHT, Vol. I, p 65.

counsel that he did not want to be examined.[137] Counsel stated that he did not observe anything in Defendant's behavior or demeanor which would demand evaluation.[138] Counsel further testified that he felt he would lose credibility with the jury if he presented mental health mitigation during the penalty phase, after he had argued vehemently during the guilt phase that Defendant was not the perpetrator in the instant case.[139] Counsel also testified that he made his decision regarding the necessity of evaluation based upon the case law in existence at the time.[140]

Counsel cannot be held ineffective for following the wishes of his client. See Fotopolous v. State, 838 So. 2d 1122, 1131 (Fla. 2002). The Court finds counsel's testimony credible that Defendant did not wish to be evaluated by a mental health expert, and that counsel adhered to his client's wishes. Additionally, Defendant has failed to demonstrate that, based upon the law at the time of counsel's decision, counsel acted deficiently in failing to engage a mental health expert. Further, when weighing the mental health mitigation testified to by Dr. McClain at evidentiary hearing against the aggravating evidence presented at trial, Defendant has failed to demonstrate that he was prejudiced by counsel's failure to have Defendant evaluated by a mental health expert. See Bell v. State, No. SC02-1765, 32 Fla. L. Weekly S307, 2007 WL 1628143 at *21, (Fla. 2007); see also Harmon v. State, 941 So. 2d 1109, 1137-1138 (Fla. 2006).

---

[137] See EHT, Vol. I, p. 66; Vol. IV, pp. 713-714.

[138] See EHT, Vol. I, p. 66; Vol. IV, pp. 713-714.

[139] See EHT, Vol. I, p 69-70.

[140] See EHT, Vol. I, p 69-70.

V. ATKINS CLAIM

Defendant further claims that, pursuant to the Atkins decision, he is prohibited from being executed because he is mentally retarded. Although Defendant's motion was filed before the Florida Supreme Court enacted Florida Rule of Criminal Procedure 3.203 in response to Atkins, the Court finds that the instant claim is governed by Atkins and rule 3.203.

To establish mental retardation, Defendant must demonstrate all three of the following: 1) significantly subaverage general intellectual functioning; 2) concurrent deficits in adaptive behavior; and 3) manifestation of the condition before age eighteen. See Fla. R. Crim. P. 3.203(b). Defendant has failed to demonstrate that he is mentally retarded. At evidentiary hearing, Dr. McClain (Defendant's expert) and Dr. Larson (the State's expert) both testified that after evaluating Defendant, they had come to the conclusion that Defendant is not mentally retarded.

Dr. McClain found that Defendant had been a below-average student.[141] However, upon further questioning, Dr. McClain conceded that Defendant obtained grades which fell in the range of above-average to failing.[142] Based upon the various tests administered by Dr. McClain, she found that Defendant's overall intellectual functioning was in the borderline range, with an IQ score of 70.[143] Dr. McClain clarified that, in laymen's terms, borderline intellectual functioning is considered

---

[141] See EHT, Vol. I, p 104.

[142] See EHT, Vol. I, pp. 140-144.

[143] See EHT, Vol. I, p 107.

a "step above" mental retardation.[144] Dr. McClain testified that Defendant's adaptive behavior, while "somewhat lower as compared with the average person," was not considered "significantly lower," so as to meet the criteria of being mentally retarded.[145] Dr. McClain testified that based upon her findings, she would *not* make a finding of mild mental retardation or mental retardation, specifically because of Defendant's level of adaptive behavior.[146]

Dr. Larson was also of the opinion that Defendant is not mentally retarded.[147] Dr. Larson testified that he had reviewed Defendant's school records, and was of the opinion that a mentally retarded person would not have been able to attain the grades obtained by Defendant.[148] Dr. Larson determined that Defendant's "full-scale" IQ was 78. Dr. Larson acknowledged that Defendant's IQ demonstrated that he had borderline intellectual functioning, consistent with Dr. McClain's findings.[149] Dr. Larson also confirmed that Defendant's IQ would not meet the statutory requirement of mental retardation.[150] Dr. Larson additionally opined that Defendant's recorded statement given to law enforcement in this case further demonstrates that Defendant is not

---

[144] See EHT, Vol. I, p 140.

[145] See EHT, Vol. I, pp. 112 & 134.

[146] See EHT, Vol. I, pp. 149-150.

[147] See EHT, Vol. I, p. 216.

[148] See EHT, Vol. II, pp. 204-206.

[149] See EHT, Vol. II, p. 174.

[150] See EHT, Vol. II, p 174.

mentally retarded.[151] Dr. Larson concurred in Dr. McClain's finding that Defendant's adaptive behavior was not substantially impaired, and that Defendant's abilities did not demonstrate either mild mental retardation "or other levels of retardation."[152]

The evidence before the Court conclusively demonstrates that Defendant is not mentally retarded. Defendant has failed to satisfy his burden, and he is not entitled to relief as to this claim.

VI. RING CLAIM

Defendant's sixth claim is based on the United States Supreme Court decision of Ring v. Arizona. However, the Supreme Court of Florida has repeatedly and consistently upheld Florida's death penalty scheme in light of Ring. See Owen v. State, 862 So. 2d 687, 703-04 (Fla. 2003); Anderson v. State, 863 So. 2d 169, 189 (Fla. 2003); Duest v. State, 855 So. 2d 33, 48-49 (Fla. 2003); Rivera v. State, 859 So. 2d 495, 508 (Fla. 2003); McCoy v. State, 843 So. 2d 396, 409 (Fla. 2003). Further, and most conclusively, the Supreme Court of Florida has held that Ring is not retroactive. See Johnson v. State, 904 So. 2d 400, 412 (Fla. 2005). Defendant is not entitled to relief as to this claim.

VII. IMPROPER *EX PARTE* COMMUNICATIONS

Defendant alleges in his first and fourth supplemental motion that the prosecutor and trial court judge

---

[151] See EHT, Vol. II, pp. 206-207.

[152] See EHT, Vol. I, p. 207.

improperly participated in *ex parte* communications during the course of Defendant's trial.[153]

In order for a defendant to receive postconviction relief upon a claim that an improper *ex parte* communication occurred, he must establish that he was denied a neutral, detached judge, such that the trial court prejudged the defendant's guilt and/or the punishment to be imposed. See Tompkins v. State, 872 So. 2d 230, 245 (Fla. 2003); Randolph v. State, 853 So. 2d 1051, 1053 (Fla. 2003); Pinardi v. State, 718 So. 2d 242, 246 (Fla. 5th DCA 1998).

During the evidentiary hearing, the following testimony was elicited from the prosecutor in Defendant's case, David Rimmer:

> DURING DIRECT EXAMINATION:
>
> Q. [By Mr. Spencer] Okay. Would you tell the Court, then, what conversations you had with Lee-Lee Smith and how it came about that you, in fact, charged him.
>
> A. [By Mr. Rimmer] Okay. In the very beginning of the case, there was a meeting at the sheriff's department between me and the investigators and Lieutenant Floyd Rose as we discussed the case. And we discussed at that

---

[153] Defendant entitles this claim as "Mr. Hurst was Denied his Rights to Effective Representation and Due Process under the Sixth and Fourteenth Amendments to the United States Constitution as well as being Subjected to Cruel and Unusual Punishment under the Eighth Amendment when the Prosecutor and the Trial Judge Engaged in an Improper Ex Parte Communication." To the extent that Defendant alleges that counsel was ineffective and that Defendant was subject to cruel and unusual punishment Defendant's claim is denied as legally insufficient.

point that we did not want to charge Lee-Lee. We were suspicious of his involvement, but we didn't want to charge him in the case and cause problems with his testimony. So I never mentioned anything to Lee-Lee about being charged.

And I was having some problems with Lee-Lee. He never appeared to want to cooperate. And I did tell him that he would have to appear in court and that if he did not appear, he could be held in contempt. I impressed that upon him. But I never told him that he was going to be charged in connection with the case. ***In fact, I never even really made a decision to do that until the case was over and Judge Tarbuck called me up to the bench and asked me why Lee-Lee had not been charged, and I told him I'd - you know, had thought about it but hadn't really made a decision to do it.***

Q. Then subsequently, you did charge him with a crime?

A. Right. After - ***after Judge Tarbuck asked me that question, I got to thinking about it and I thought, well, maybe I should.***[154]

DURING CROSS EXAMINATION:

Q. [By Mr. Brody] Okay. Well, you said the judge asked you when you were going to - when you were going to file charges against Lee-Lee?

A [By Mr. Rimmer] No, Judge Tarbuck just asked the question, you know. He didn't say,

---

[154] See EHT, Vol. IV, pp. 669-670 (emphasis added).

when are you going to file charges? He just says he asked, you know, why hasn't Lee-Lee been charged, after he heard all the evidence and after, you know, we rested our case.

Q. Right. Did when did he say that, before the jury came back?

A. I think it was after the verdict, I believe. I'm not really sure. I do remember -

Q. Before the death penalty was -

A. You know, I honestly don't remember that, either. It could have been before the death penalty. It could have been after the death penalty.

Q. Okay.

A. I don't remember.

* * *

Q. And the judge thought he should be prosecuted and

MR. SPENCER: Your Honor, the question's been asked and answered, exactly what Judge Tarbuck told Mr. Rimmer.

THE COURT: Well, and I don't know if there was something different to the end of your sentence, so go ahead and finish your question.

Q. [By Mr. Brody] And the judge thought he should be prosecuted, and you intended - you intended to file charges against him all along?

A. Well, I wondered about it.

THE COURT: Overruled.

THE WITNESS: I, you know, thought about it. ***But Judge Tarbuck didn" say, you should charge this guy. He didn't indicate that he should be charged. He just asked the question. After he had heard all of the evidence, he just asked the question, you know, why hasn't Lee-Lee been charged or are you going to charge him, something like that***

Q. [By Mr. Brody] Well, did you - did you tell the defense attorney about that conversation?

A. I don't believe I did.

Q. Did you do anything to make that conversation known?

A. No. I didn't think it was material.

Q. Well, ***it was obviously an ex parte conversation, was it not?***

A. ***It wasn't an ex parte conversation as to Mr. Hurst.***

Q. Why not? It was during his trial.

A. It was just the judge asking a question that was on his mind as to whether or not I had any plans to charge Lee-Lee. He didn't -

Q. Well, if Lee-Lee had been a witness in your case and the judge obviously thought was had some concern about Lee-Lee's guilt -

MR. SPENCER: Judge, he's being argumentative with the witness. Objection.

THE COURT: Yes.

Q. [By Mr. Brody] ***What was your answer when the judge asked you that?***

A. *I don't recall. I told him I had you know, it was something I had thought about, and I wasn't really sure yet if I was going to.*

* * *

Q. I just want to be clear. This conversation might have occurred after the verdict but before sentencing or you're not exactly sure?

A. I'm not - I'm not exactly sure.

Q. *Did you have any other conversations with Judge Tarbuck about either Lee-Lee Smith or this case?*

A. *No.*[155]

In his first supplemental motion, without the benefit of the evidentiary hearing transcripts, Defendant added a claim alleging improper *ex parte* communication based on the above testimony. In its response, the State did not object to amending the postconviction motion to include this claim, but argued that the claim fails on the merits as a matter of law. It is the State's contention that Defendant's claim fails to establish that he was deprived of a neutral, detached judge and, further, that Defendant had ample opportunity to cross-examine Mr. Rimmer on this allegation during the postconviction evidentiary hearing. The State also asserted that the communication was limited to matters concerning Lee-Lee Smith, and therefore was not an *ex parte* communication concerning Defendant or the instant case. At the case management conference, the defense argued that "it doesn't make any sense" that the conversation was limited to Mr. Smith. That asser-

---

[155] See EHT, Vol. IV, pp. 686-691 (emphasis added).

tion, however, does not equate to a sufficient factual basis to support a postconviction claim. After reviewing the evidentiary hearing transcript and supplemental claim, the Court agreed with the State's characterization of this claim. The Court determined that Defendant's claim of *ex parte* communication was insufficiently pled. However, Defendant was given leave to depose Mr. Rimmer and Judge Tarbuck, and amend the instant claim.

In Defendant's fourth supplemental motion, Defendant attaches the depositions of Mr. Rimmer and Judge Tarbuck as exhibits, and again asserts that *ex parte* communication occurred in the instant case. Even with the benefit of postconviction discovery, Defendant has failed to establish that he was deprived of a neutral, detached judge. The Court finds that the communication in question was limited to matters concerning Lee-Lee Smith and had no bearing on the judge's treatment of Defendant either during trial or during sentencing. Defendant is not entitled to relief as to this claim.

VIII. CARL HESS'S STATEMENT TO THE GRAND JURY

Defendant's second supplemental motion contained only one claim. Specifically, Defendant alleges that the State knowingly presented false testimony of Carl Hess to the grand jury in violation of Anderson. Defendant bases this new claim on the fact that: 1) at the evidentiary hearing Mr. Hess stated that he testified before the grand jury; 2) Hess further testified at the evidentiary hearing that he told the grand jury he interviewed Defendant for a job at Wendy's (consistent with the alleged false testimony discussed previously); 3) Hess further testified that the testimony was false; and

4) Hess testified at trial that he did not tell the "authorities" initially about the interview.

First, the Court notes that Defendant's version of events (which the Court recognizes was prepared without the benefit of a transcript) misstates the record. During the continuation of the evidentiary hearing, the following exchange took place regarding the grand jury testimony:

> Q [By Mr. Hazen] Did you testify at the grand jury in this case?
>
> A. [By Carl Hess] Yes, sir.
>
> Q. ***Do you recall if you testified at the grand jury that you interviewed Mr. Hurst?***
>
> A. ***It never came up.***
>
> * * *
>
> Q. ***In any event, if the record reflects that you did testify at the grand jury and you testified that you interviewed Mr. Hurst, that's not true?***
>
> A. ***It never came up.***[156]

Moreover, Defendant contends that the fourth fact listed above somehow proves that the State knew Hess's testimony before the grand jury was false. However, the fact that Mr. Hess testified at trial that he did not tell the "authorities" initially about the interview does not equate to a knowing presentation of false testimony to the grand jury by the State, even when coupled with the statement in Investigator Nesmith's notes that Hess "saw suspect apply for job."

---

[156] See EHT2, p. 28. (emphasis added).

None of the alleged statements are sufficiently inconsistent to demonstrate that the State knowingly offered false evidence.

Defendant also argues that the mere fact that Hess lied to the grand jury entitles him to relief, regardless of the lack of wrongdoing by the State. Any such claim, however, is without merit, as the record does not reflect that the witness admitted to lying to the grand jury at the evidentiary hearing.

Defendant has failed to demonstrate that he is entitled to relief as to this claim.

IX CUMULATIVE ERROR

Because the Court has found that Defendant's allegations of Brady and/or Giglio violations, newly discovered evidence, ineffective assistance of counsel during the guilt and penalty phases, and other miscellaneous claims have no merit, a cumulative analysis of Defendant's claims does not entitle Defendant to relief.

CONCLUSION

Defendant has failed to meet his burden of showing prejudicial error in support of his motion. Defendant has failed to demonstrate that any Brady or Giglio violations occurred in the instant case. The Court finds that trial counsel was not ineffective under the standards espoused in Strickland, because his actions fell within the wide range of reasonable professional judgment, and because Defendant has not shown that the result of the trial and sentencing would have likely been different. See Strickland, 466 U.S. at 699, 104 S. Ct. 2070. Defendant's claims of newly discovered evidence consist mostly of incredible testimony; this observation aside, the "newly discovered evidence" presented by Defendant would not have changed the out-

come of the instant case. Defendant's remaining claims are either procedurally barred or without merit.

Accordingly, it is **ORDERED** and **ADJUDGED** that:

1. Defendant's "Motion to Vacate Judgment of Conviction and Sentence," is hereby **DENIED** in its entirety;

2. Defendant has thirty (30) days from the date of this order to file a notice of appeal, should he so choose.

DONE AND ORDERED in Chambers at Pensacola, Escambia County, Florida, this of 23rd day of August, 2007.

/s/ LINDA L. NOBLES
LINDA L. NOBLES
CIRCUIT JUDGE

LLN/mco

Copies to:
√ Timothy Hurst, DC# 124669, Union Correctional Institution, 7819 NW 228th St., Raiford, FL 32026-4000
√ Jeffrey Hazen, Esq., and Harry Brody, Esq., 1804 Miccosukee Commons Dr., Suite 200, Tallahassee, FL 32308
√ Stephen R. White, AAG, Office of the Attorney General, The Capitol, PL-01, Tallahassee, FL 32399
√ John C. Spencer, ASA, c/o Kay Buckner, 190 Governmental Center, Pensacola, FL 32501

SUPREME COURT OF FLORIDA

TIMOTHY LEE HURST,
Appellant.

v.

STATE OF FLORIDA,
Appellee.

No. SC07-1798
Sept. 17, 2009
[18 So. 3d 975]

PER CURIAM.

Timothy Lee Hurst appeals from an order denying his motion filed under Florida Rule of Criminal Procedure 3.851 seeking to vacate his judgment of conviction of first-degree murder and sentence of death.[1] For the reasons explained below, we vacate the sentence of death and remand for a new penalty phase proceeding. We affirm the circuit court's order denying relief as to the remainder of Hurst's claims.

I. BACKGROUND

Hurst, who was nineteen at the time of the murder, was convicted of the May 2, 1998, first-degree murder of Cynthia Harrison in Escambia County. His conviction and sentence of death were affirmed on direct appeal in *Hurst v. State*, 819 So.2d 689 (Fla.), *cert. denied*

[1] This Court has jurisdiction under article V, section 3(b)(1), Florida Constitution.

537 U.S. 977, 123 S.Ct. 438, 154 L.Ed.2d 336 (2002).[2] Hurst now appeals the denial of his initial and amended rule 3.851 motions after an evidentiary hearing was held on most of his claims. First, the relevant circumstances of the crime and trial are set forth.

A. Facts of the Murder

On May 2, 1998, Hurst was employed at a Popeye's restaurant on Nine Mile Road in Escambia County, where Cynthia Harrison was employed as an assistant manager. Hurst and Harrison were both scheduled to arrive at work that day at 8 a.m., in order to prepare for the 10:30 a.m. opening. Harrison arrived first, somewhere between 7:15 and 7:30 a.m. That same morning, Carl Hess arrived for work at a nearby Wendy's restaurant at 7 a.m. He testified that sometime between 7 and 8:30 a.m., as he was working in the Wendy's parking lot, he saw a man who was about six feet tall and weighing between 280 and 300 pounds, dressed in a Popeye's uniform, arrive at Popeye's and bang on the door and window. Eventually, a woman came to the door and let him in. Hess picked Hurst from a photographic lineup as the man he saw banging on the door and window and, at trial, he identified Hurst as the man he saw that morning. Hess said he had seen Hurst working at Popeye's before and that

---

[2] On direct appeal, Hurst raised four claims, all of which pertained to the penalty phase of his trial: (1) that the trial court erred in finding the avoid arrest aggravator; (2) that the court failed to properly weigh mitigating circumstances; (3) that the death sentence was disproportionate; and (4) that imposition of the death sentence without notice of aggravating circumstances or jury findings on the aggravators and death eligibility violated due process and the prohibition against cruel and unusual punishment. *Hurst*, 819 So.2d at 695.

Hurst had filed an application for employment at Wendy's, but had not been hired.

That same May 2 morning, a Popeye's delivery truck was making rounds to the restaurants. Janet Pugh, who worked at another Popeye's, telephoned Harrison at 7:55 a.m. to tell her that the delivery truck should be expected soon at her restaurant. Pugh spoke to Harrison for four or five minutes and did not detect anything wrong or hear anyone in the background. Shortly after 8 a.m., Popeye's employee Anthony Brown arrived, only to find the door locked, although he saw Harrison's car in the parking lot. The delivery truck arrived about five minutes after Brown, and the driver and Brown waited outside the restaurant until Tonya Crenshaw, another Popeye's assistant manager, arrived. Neither Brown nor the delivery driver saw Hurst or his car.

When Tonya Crenshaw arrived at about 10:30 a.m. and unlocked the door, she and the delivery driver entered and found the safe open and the previous day's receipts and $375 in small bills and change missing. Harrison's body was discovered inside the freezer with her hands bound behind her back with electrical tape and with tape over her mouth. Similar tape was later found in the trunk of Hurst's car. A significant amount of the victim's blood was present although it appeared from water on the floor that someone had attempted to clean up the scene.

Harrison suffered at least sixty slash and stab wounds to her face, neck, back, torso, and arms. Dr. Michael Berkland testified that several of the wounds had the potential to be fatal and that Harrison probably survived no more than fifteen minutes. A box cutter with Harrison's blood on it was found near her body,

and Dr. Berkland testified that her wounds were consistent with the use of a box cutter. It was not the type of box cutter that was used at Popeye's, but was similar to a box cutter that Hurst had been seen with several days earlier. Dr. Berkland testified that the likely "window" for the time of death was between 7:55 a.m. and 8:15 a.m.

Hurst's friend, Michael Williams, testified that Hurst had previously talked about robbing Popeye's and had subsequently admitted that he killed Harrison with a box cutter after they had an argument and because he "did not want the woman to see his face." Another friend, Lee ("Lee–Lee") Smith, testified that on the night before the murder, Hurst said he was going to rob Popeye's. On the morning of the murder, Hurst arrived at Smith's house and, according to Smith, admitted that he had killed Harrison and put her in the freezer. Hurst brought with him a container of money and instructed Smith to keep it for him. Smith said he washed Hurst's bloody pants and threw away Hurst's socks and shoes, along with some other items. Later that same morning, Smith and Hurst went to Wal-Mart where Hurst bought a new pair of shoes. They also went to a pawn shop near Wal-Mart where Hurst saw some rings he wanted to buy. After retrieving some of the stolen money, he returned to the pawn shop and bought three rings for $300. An employee of the pawn shop picked Hurst out of a photographic lineup as the man who had purchased the rings, and the rings were recovered from Hurst.

Smith's parents, who were out of town on the day of the murder, discovered the container of money in Smith's room when they returned on May 3. They contacted law enforcement, and responding deputies found a coin purse containing Harrison's driver's license in a

garbage can located in Smith's yard. They also found a bank bag marked "Popeye's"; a deposit slip with three of Hurst's fingerprints; a bloodstained sock with DNA typing consistent with Harrison; and a sheet of notebook paper marked "Lee Smith, language lab" on one side and with $2,226 and $1,751.54 written on the other side. One of the numbers written there matched a number on the deposit slip. Smith's father also gave the police a pair of size fourteen shoes, which had been found in the same trash can. The shoes were several sizes larger than those worn by Lee–Lee Smith and appeared to have blood stains on them. Florida Department of Law Enforcement crime lab analyst Jack Remus testified that the shoes exhibited indications of blood but that attempts at DNA testing were unsuccessful.

In a tape recording of Hurst's interview with the police several days after the murder, Hurst said he had been on his way to work on May 2 when his car broke down. Hurst said he telephoned Harrison to say he would not be in and that during the conversation she sounded scared. He testified that he then went to Smith's house, changed out of his work clothes, and went to the pawn shop where he bought necklaces for friends. In the taped interview, he did not mention buying the three rings at the pawn shop or buying new shoes at Wal-Mart that morning, although the investigative reports did indicate that the Sheriff's investigators knew Hurst had gone to Wal-Mart and purchased new shoes. The jury found Hurst guilty of first-degree murder, and the case proceeded to the penalty phase. Because this appeal involves a significant penalty phase claim requiring remand for a new penalty phase proceeding, a brief summary of the penalty phase evidence is set forth.

B. Penalty Phase and Sentencing

In the penalty phase, the State presented only the victim's sister, Tricia Poleto, who testified that Cynthia Harrison was twenty-eight years old when she died and was much loved and missed by her family and her husband. In mitigation, the defense presented Hurst's mother, Bertha Bradley, who testified that he did not have a bad temper but was a happy child who never had trouble with the law. She testified that Hurst was helpful around the house, attended church regularly, and made average grades in school, although he was slow and could not learn like other children. According to Mrs. Bradley, Hurst had an emotional age of a child about ten or eleven years old, was a follower and not a leader, and would do whatever his friend Lee–Lee Smith told him to do. She related that Hurst was employed at Popeye's and worked hard to reach his goal of being able to buy a car. To her knowledge, he never had any psychiatric problems and had not been treated by a psychiatrist or psychologist.

The defense also presented Hurst's sister, Sequester Katina Hurst, who testified that she and Hurst grew up in a house where the children did a lot of things together and played a lot of games. Because their father worked two jobs and their mother also worked, Hurst had to take care of the younger children and care for the house. She never saw Hurst lose his temper or get into fights and said he was a happy person who liked to joke around. She agreed Hurst was slower than others his age but said that he tried really hard in everything he did. The last mitigation witness, Hurst's father, Timothy Bradley, testified that Hurst was a Christian who participated in Bible studies and helped out at church. He testified that Hurst was a

good boy who helped around the neighborhood and did not have a violent streak.

The trial court instructed the jury on two aggravating circumstances—commission of the murder during a robbery and that the murder was especially heinous, atrocious or cruel (HAC)—and on a number of mitigating circumstances for consideration by the jury. The jury voted eleven to one to recommend death. The trial court sentenced Hurst to death and found not two (the number on which the jury was instructed), but three aggravating circumstances: (1) the murder was committed by a person engaged in the commission of a robbery ("great weight"); (2) the murder was especially heinous, atrocious, and cruel (HAC) ("great weight"); and (3) the murder was committed primarily for the purpose of avoiding or preventing a lawful arrest ("great weight").

The trial court found the following mitigating factors: (1) Hurst's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired ("little weight"); (2) he exhibited good conduct through every phase of the trial ("little weight"); (3) he had no prior criminal history ("moderate weight"); (4) he made contributions to the community in assisting his church and neighbors ("little weight"); (5) he attended church regularly and participated in weekly Bible study ("little weight"); (6) he assisted his mother and father around the home and took care of and protected his younger siblings ("moderate weight"); and (7) Hurst's age at the time of the murder was eighteen ("very little weight").

On direct appeal, Hurst challenged the finding of the avoid arrest aggravator as not supported by competent, substantial evidence, and this Court agreed.

We concluded, however, that the error in finding the aggravator was harmless in light of the other two strong aggravators "weighed against relatively weak mitigation." *Hurst*, 819 So.2d at 696. We also concluded that the trial court erred in essentially rejecting the "good family background" mitigator even though it was established by uncontroverted testimony. That error was also found to be harmless, however, because the trial court did consider and give weight to other family and community mitigation and because of the severity of the aggravators. *Id.* at 699. Finally, in holding the death sentence to be proportionate, we noted the "relatively little mitigation." *Hurst*, 819 So.2d at 702.

Hurst has raised several guilt phase postconviction claims and one penalty phase claim. He also contends that the cumulative effect of errors in the guilt and penalty phases deprived him of a fair trial. We turn first to the guilt phase claims.

II GUILT PHASE CLAIMS AFTER AN EVIDENTIARY HEARING

A. *Brady* and *Giglio* Claims

Hurst first contends that the State withheld favorable, material evidence in violation of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963),[3]

---

[3] In *Brady*, the Supreme Court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87, 83 S.Ct. 1194. The Supreme Court later held in *United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), that "the duty to disclose such evidence is applicable even though there has been no request by the accused." *Strickler v. Greene*, 527 U.S. 263, 280, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999) (citing *Agurs*, 427 U.S. at 107, 96 S.Ct. 2392).

in regard to State's witnesses David Kladitis, Anthony Williams, and Lee–Lee Smith. We disagree and affirm the trial court's denial of postconviction relief on these claims. A *Brady* violation occurs "when the government fails to disclose evidence materially favorable to the accused." *Youngblood v. West Virginia*, 547 U.S. 867, 869, 126 S.Ct. 2188, 165 L.Ed.2d 269 (2006); see also Riechmann v. State, 966 So.2d 298, 307 (Fla.2007) (citing *Mordenti v. State*, 894 So.2d 161, 168 (Fla. 2004)). The government's obligation to disclose materially favorable evidence extends to both exculpatory and impeachment evidence, *United States v. Bagley*, 473 U.S. 667, 676, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), and to "evidence that is 'known only to police investigators and not to the prosecutor.' " *Youngblood*, 547 U.S. at 870, 126 S.Ct. 2188 (quoting *Kyles v. Whitley*, 514 U.S. 419, 438, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995)).

Standard of Review for a *Brady* Claim

In order to demonstrate a *Brady* violation, the defendant has the burden to show (1) that favorable evidence, either exculpatory or impeaching, (2) was willfully or inadvertently suppressed by the State, and (3) because the evidence was material, the defendant was prejudiced. *Strickler v. Greene*, 527 U.S. 263, 281–82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999); *see also Way v. State*, 760 So.2d 903, 910 (Fla.2000). In order to meet the materiality prong of *Brady*, the defendant must demonstrate "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Youngblood*, 547 U.S. at 870, 126 S.Ct. 2188 (quoting *Strickler*, 527 U.S. at 280, 119 S.Ct. 1936). "[A] 'showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have

resulted ultimately in the defendant's acquittal.' " *Youngblood*, 547 U.S. at 870, 126 S.Ct. 2188 (quoting *Kyles*, 514 U.S. at 434, 115 S.Ct. 1555). A reasonable probability of a different result "is a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *see also Strickler*, 527 U.S. at 290, 119 S.Ct. 1936.

Postconviction *Brady* claims present mixed questions of law and fact. Where, as here, the trial court has conducted an evidentiary hearing, we will defer to the factual findings of the trial court that are supported by competent, substantial evidence, but will review the application of the law to the facts de novo. *Sochor v. State*, 883 So.2d 766, 785 (Fla.2004); *see also Lowe v. State*, 2 So.3d 21, 29 (Fla.2008). Moreover, "this Court will not substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court." *Lowe*, 2 So.3d at 30 (quoting *Blanco v. State*, 702 So.2d 1250, 1252 (Fla. 1997)). It is within this framework that we first discuss the *Brady* claims raised by Hurst.

1. *Brady* Claim Regarding the Testimony of David Kladitis and Lee–Lee Smith

Hurst contends that the State failed to disclose favorable, material evidence that State's witness David Kladitis saw several young black men in the parking lot of the Popeye's at around 7 a.m. on the morning of the murder. At the jury trial, Kladitis testified only that early on the day of the murder, while at the Barnes feed store near Popeye's, he saw Cynthia Harrison drive by in her car about 7:15 or 7:20 a.m., and that a large blue car, driven by a black man, was driving along

behind her. He identified the blue car as matching Hurst's blue car. At the evidentiary hearing, Kladitis testified that he was deposed in the case but was never asked about any other observations he made concerning the Popeye's parking lot on the morning of the murder, even though he did report those observations to the Sheriff's Office investigators. That additional information was never disclosed to the defense.

Kladitis testified at the evidentiary hearing that on the morning of the murder, he left the Barnes feed store to get a take-out breakfast and then returned to a parking lot near the Popeye's to eat. He saw a white automobile occupied by a couple of young black men drive into the Popeye's parking lot with the windows down and "music playing real loud." Another automobile then drove up with several black men in it, also playing loud music. Around 7 a.m., Kladitis moved his car because the music was too loud. Hurst contends that this evidence was favorable because these individuals could be viewed as suspects in the murder, consistent with his theory of defense at trial that some other young black men committed the murder.

The postconviction court concluded that the additional information Kladitis gave to investigators "does not undermine confidence in the verdict," noting that Harrison was not killed until after 8 a.m., while the men Kladitis saw in the parking lot were there much earlier and were playing loud music. The court concluded that the additional evidence, when considered with the totality of the other evidence in the case, does not demonstrate a *Brady* violation. We agree.

"[T]he prosecution is not required to provide the defendant all information regarding its investigatory work on a particular case regardless of its relevancy or

materiality." *Overton v. State*, 976 So.2d 536, 562 (Fla.2007) (citing *Carroll v. State*, 815 So.2d 601, 620 (Fla.2002)). *Compare Rogers v. State*, 782 So.2d 373, 384 (Fla.2001) (finding *Brady* violation for nondisclosure of police reports containing a tape revealing favorable, relevant evidence of coaching by the prosecutor and conflicting accounts of a witness's testimony) *with Wright v. State*, 857 So.2d 861, 870 (Fla.2003) (rejecting claim that "information contained in police files concerning other possible suspects and other criminal activity in the same neighborhood" was *Brady* material). In applying the *Brady* criteria, "the evidence must be considered in the context of the entire record." *Floyd v. State*, 902 So.2d 775, 779 (Fla.2005). "It is the net effect of the evidence that must be assessed." *Way*, 760 So.2d at 913 (quoting *Jones v. State*, 709 So.2d 512, 521 (Fla.1998)).

We conclude that the additional information Kladitis provided about the men he saw in the parking lot more than an hour before the murder is not exculpatory or impeaching and is of questionable relevance. The additional evidence that Kladitis could have offered did not tie the unidentified men to the Popeye's crimes in any relevant manner, so no *Brady* violation occurred. Even if the State should have disclosed these additional observations made by Kladitis, any error in the State's failure to disclose this evidence does not undermine our confidence in the verdict when viewed in light of the totality of all the evidence in the case. Thus, the trial court's denial of relief on the *Brady* claim relating to witness Kladitis is affirmed.

Hurst also contends that the State committed a *Brady* violation in failing to disclose the fact that Lee–Lee Smith would be charged with a crime in connection with the case. Smith was the State's main witness

against Hurst and testified at trial that Hurst came to his home around 8:30 a.m. on the morning of the murder and admitted that he had killed Harrison. Smith hid the money Hurst brought with him, washed Hurst's bloody pants, and threw away Hurst's tennis shoes and socks. At the time of trial, Smith had not been charged with any crimes in connection with the Popeye's robbery and murder. After the trial concluded, Smith was charged as a juvenile—as an accessory after the fact—and was subsequently convicted of that charge. Hurst argues on appeal that if the jury had known Smith would be charged in connection with the crime, there would have been no basis for the State's argument below that Smith would do anything that Hurst wanted. Hurst also contends that Smith's credibility before the jury would have been impeached if the jury had known he would be charged. Based on the testimony at the evidentiary hearing, we agree with the trial court that no *Brady* violation occurred.

When Smith testified at the evidentiary hearing, he was uncertain about when he learned he would be charged in the case. The prosecutor, David Rimmer, also testified and denied telling Smith or his mother before trial that Smith would be charged. The prosecutor also denied that he had a plan to charge Smith and said that he did not decide to do so until after the trial was over. The postconviction court denied the claim, finding that the credible evidence demonstrated that the prosecutor did not tell Smith or Smith's mother before trial that he would be charged. The postconviction court found Smith's testimony uncertain and Rimmer's testimony credible, and we will not substitute our judgment for that of the trial court on this question of fact, the credibility of the witnesses, or the weight giv-

en to the evidence by the trial court. *See Lowe*, 2 So.3d at 30. Thus, relief is denied on this claim.[4]

2. *Brady* and *Giglio* Claims Regarding the Testimony of Anthony Williams

Hurst next contends that the State committed a *Brady* violation in regard to the trial testimony of Anthony Williams by not disclosing that he was promised leniency by the prosecutor in exchange for his testimony at trial, now alleged to be false, that Hurst confessed to Harrison's murder. Hurst further argues that a *Giglio* violation occurred in regard to Williams' testimony when the prosecutor argued falsely to the jury that there were no promises of leniency. As we will explain, this claim is also without merit.

Standard of Review for *Giglio* Claims

Under *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), the prosecutor is prohibited from knowingly presenting false testimony against the defendant. In order to demonstrate a *Giglio* violation, "a defendant must show that (1) the prosecutor presented or failed to correct false testimony; (2) the prosecutor knew the testimony was false; and (3) the false evidence was material." *Tompkins v. State*, 994 So.2d 1072, 1091 (Fla.2008) (quoting *Rhodes*

---

[4] Hurst also makes a passing reference in his brief to a *Giglio* claim in relation to Smith's trial testimony. *See Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972) (holding that the prosecutor is prohibited from knowingly presenting or failing to correct false and material evidence against the defendant). We find this claim to be without merit essentially for the same reasons that we deny the *Brady* claim. The trial court found the prosecutor credible when he testified that he did not tell Smith he would be charged and did not decide to charge him until later.

v. State, 986 So.2d 501, 508-09 (Fla.2008)). Once the first two prongs are established by the defendant, the false evidence is deemed material if there is any reasonable possibility that it could have affected the jury's verdict. *Tompkins*, 994 So.2d at 1091. The State then "has the burden to prove that the false testimony was not material by demonstrating it was harmless beyond a reasonable doubt." *Id.* (quoting *Rhodes*, 986 So.2d at 509). "The *DiGuilio* harmless error test requires the State to prove 'that there is no reasonable possibility that the error contributed to the conviction.'" *Guzman v. State*, 941 So.2d 1045, 1050 (Fla.2006) (quoting *State v. DiGuilio*, 491 So.2d 1129, 1138 (Fla.1986)). A *Giglio* claim presents mixed questions of law and fact, and this Court will defer to the factual findings of the circuit court that are supported by competent, substantial evidence and review the application of the law to the facts de novo. *See Lynch v. State*, 2 So.3d 47, 83 (Fla.2008) (citing *Sochor*, 883 So.2d at 785).

At the jury trial, Anthony Williams testified that he and Hurst were cellmates in the Escambia County jail, where they discussed the Popeye's murder. Williams testified that Hurst told him "[t]hat he had participated in it." At the evidentiary hearing, Williams, currently serving a life sentence for armed robbery, testified that he committed perjury at Hurst's trial when he testified that Hurst told him he participated in the crime. According to Williams, on the day of trial he told the prosecutor that he did not want to testify and the prosecutor said "that I knew to do the right thing and he would take care of me in the long run." Williams interpreted this to mean if he testified, he would get some leniency, but as it turned out he did not.

The prosecutor, David Rimmer, testified at the evidentiary hearing that he never talked to Anthony Wil-

liams about his cases and that he "never made any promises to him about his pending cases." Rimmer said Williams' main concern was being kept apart from Hurst and "I told him I could take care of that: I could keep him separated from Timothy Hurst and any other inmates that he felt might try to harass him." Rimmer explained, "I never give them any indication that I'm going to do anything. I always, in fact, cut them off and tell them to start with, I can't make you any promises.... And the only promise I can make is that I'll keep them separated from the other inmates, from the defendant."

After hearing testimony from Williams and the prosecutor, the postconviction court denied relief on the claims. First, the postconviction court found that Williams' evidentiary hearing testimony recanting his trial testimony was not credible and noted that Williams had waited over two years to report that Hurst had not confessed. The court also found that the State did not fail to disclose any promises made to Williams in violation of *Brady* because the court found, based on the testimony of prosecutor Rimmer, that no promises were made. We will not second-guess the postconviction court on this issue of credibility of the witnesses and agree that no *Brady* violation has been shown.

The postconviction court also concluded that a *Giglio* violation had not been proven. Hurst contends that the prosecutor argued falsely when he said during closing argument:

> There's been no testimony that the inmates want reductions in their sentences. There's been no testimony that that's why they came forward; none whatsoever.... There's been no testimony that these inmates have tried to get a reduction in their sentence.

Based on the testimony presented and found credible at the evidentiary hearing, the trial court correctly concluded that no promises of leniency had been made to Williams. Thus, this *Giglio* claim that the prosecutor argued falsely is refuted by competent, substantial evidence, and we will not substitute our judgment for that of the circuit court on these questions of fact and determination of credibility.

Because Hurst has not demonstrated a *Brady* violation or a *Giglio* violation in relation to witnesses David Kladitis, Lee–Lee Smith, or Anthony Williams, relief is denied on this claim.

B. Newly Discovered Evidence Claims

Hurst next contends (1) that Anthony Williams' recantation of his trial testimony that Hurst confessed and Williams' admission to committing perjury at Hurst's trial constitute newly discovered evidence requiring a new trial; (2) that Lee–Lee Smith's post-trial indictment and conviction as an accessory after the fact in connection with the Popeye's murder is newly discovered evidence that would have significantly impeached his harmful trial testimony, thus requiring a new trial or at least a new sentencing; and (3) that the admission by a trial witness, Carl Hess, that he never interviewed Hurst, as he testified at trial, is newly discovered evidence that requires a new trial.

As explained below, we find that Hurst failed to demonstrate that a new trial is required based on any of his newly discovered evidence claims. First, we set forth the standard of review for claims of newly discovered evidence.

Standard of Review for Newly Discovered Evidence

To obtain a new trial based on newly discovered evidence, a defendant must establish two things: First, the defendant must establish that the evidence was not known by the trial court, the party, or counsel at the time of trial and that the defendant or defense counsel could not have known of it by the use of diligence. Second, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial. *See Jones v. State*, 709 So.2d 512, 521 (Fla.1998). "Newly discovered evidence satisfies the second prong of this test if it 'weakens the case against [the defendant] so as to give rise to a reasonable doubt as to his culpability.' " *Heath v. State*, 3 So.3d 1017, 1023-24 (Fla.2009) (quoting *Jones*, 709 So.2d at 526).

In determining whether newly discovered evidence requires a new trial, the trial court must " 'consider all newly discovered evidence which would be admissible,' and must 'evaluate the weight of both the newly discovered evidence and the evidence which was introduced at the trial.' " *Heath*, 3 So.3d at 1025 (quoting *Jones v. State*, 591 So.2d 911, 916 (Fla. 1991)). This determination includes consideration of evidence that goes to the merits of the case as well as impeachment evidence. The trial court should also determine whether this evidence is cumulative to other evidence in the case, whether the evidence is material and relevant, and whether there are any inconsistencies in the newly discovered evidence. *Jones*, 709 So.2d at 521. "[A]bsent an abuse of discretion, a trial court's decision on a motion based on newly discovered evidence [including a witness's newly recanted testimony] will not be overturned on appeal." *Lowe*, 2 So.3d at 39 (brackets in original) (quoting *Mills v. State*, 786 So.2d 547, 549 (Fla.2001)). In reviewing the circuit court's deci-

sion as to a newly discovered evidence claim following an evidentiary hearing, where the court's findings are supported by competent, substantial evidence, we will not substitute our judgment for that of the trial court on questions of fact, credibility of the witnesses, or the weight to be given to the evidence by the trial court. *Jones*, 709 So.2d at 532.

1. Newly Discovered Evidence Concerning Anthony Williams and Lee–Lee Smith

Anthony Williams testified at the evidentiary hearing that he committed perjury at Hurst's trial when he told the jury that Hurst confessed. However, as the postconviction court found and this Court has noted, "recanted testimony is 'exceedingly unreliable,' and if a trial court is not satisfied that the recanted testimony is true, *it has a duty to deny the defendant a new trial.*" *Heath*, 3 So.3d at 1024 (quoting *Consalvo v. State*, 937 So.2d 555, 561 (Fla.2006)). The postconviction court found that Hurst did not satisfy the first prong of the newly discovered evidence test because it concluded Williams' evidentiary hearing testimony was not credible. As to the second prong, the postconviction court further found that, even if Williams' evidentiary hearing testimony was presented to the jury, it would not have changed the outcome of Hurst's trial. We agree with these findings.

In the instant case, the trial court simply did not believe Williams, who was a cellmate with Hurst in the Escambia County jail. Williams testified that he thought by testifying against Hurst at tri al, he would receive some favorable sentencing treatment in his own pending case. As it turned out, Williams received a life sentence. Even if the jury never heard Anthony Williams' testimony that Hurst confessed, or if it heard

Anthony Williams' recantation of that testimony, other evidence in the case must be considered when determining if a new trial is required. Other evidence included the fact that Smith testified that Hurst confessed to the murder and gave him a container with the money from the robbery. The bag containing the stolen money also contained a Popeye's bank deposit slip with Hurst's fingerprints. Hurst's supervisor testified that Hurst would have had no occasion to place his fingerprint on the deposit slips. Hess identified Hurst as the man he saw entering Popeye's that morning.

In addition, Michael Williams (as distinguished from Anthony Williams) testified at trial that he had known Hurst for a long time and that Hurst told him about the murder.[5] He testified that Hurst said he had gotten into an argument with a woman and hit her, cut her with a box cutter, and put her in the freezer because "he didn't want the woman to see his face." Michael Williams also testified that he had heard Hurst and Smith talking about robbing Popeye's on several occasions. Hurst bought new tennis shoes on the morning of the murder and other tennis shoes consistent with Hurst's large size were found in the trash at Smith's house bearing indications of blood. Finally, tape similar to that which bound Cynthia Harrison was found in Hurst's trunk. In "consider[ing] all newly discovered evidence which would be admissible" and "evaluat[ing] the weight of both the newly discovered evidence and the evidence which was introduced at the trial,'" *Jones*, 709 So.2d at 521 (quoting *Jones*, 591 So.2d at 916), we conclude that the case against Hurst would

---

[5] Hurst's longtime friend Michael Williams is not to be confused with trial witness Anthony Williams, who was a cellmate of Hurst and testified against him at trial.

not have been weakened to such an extent that he probably would have been acquitted, even if the jury heard the recantation of Anthony Williams' testimony.

As to the claim of newly discovered evidence concerning Lee–Lee Smith, Hurst contends that the fact that Smith was charged and convicted after Hurst's trial as an accessory after the fact in connection with the Popeye's crimes is newly discovered evidence that probably would have resulted in either an acquittal or a life sentence.[6] Smith's trial testimony gave a detailed account of Hurst's confession to the murder and production of the stolen money. The jury heard how Smith, age fifteen at the time, assisted Hurst in hiding the money, washing Hurst's bloody pants, and throwing away Hurst's bloody shoes and sock. Hurst contends that if the jury had known Smith was a codefendant in the case and was guilty of being an accessory after the fact, it would have impeached his credibility and would have dispelled the State's suggestion that Smith was just a dupe of Hurst.

The postconviction court denied relief on this claim, concluding that Hurst had not demonstrated the result of the trial would probably have been different. The court noted that had the jury known that Smith was a codefendant in the case and was guilty as an accessory after the fact, it is likely the jury would have given Smith's trial testimony even more credibility. In fact, Smith's testimony clearly apprised the jury of the very same actions which underlay his later conviction as accessory, so the jury already had that information when

---

[6] We do not address Hurst's additional claim that the newly discovered evidence regarding Smith would have resulted in a life sentence, because in this decision we vacate Hurst's death sentence and remand for a new penalty phase proceeding.

assessing his credibility. Moreover, other evidence in the case tied Hurst directly to the murder and robbery and would not have been rebutted or diminished in any way by the jury learning that Smith was guilty of being an accessory after the fact. Because the new evidence would probably not produce an acquittal on retrial, the postconviction order denying the newly discovered evidence claim relating to Smith is affirmed.

2. Newly Discovered Evidence Concerning Carl Hess

Carl Hess was the only eyewitness directly placing Hurst at the scene of the crime. Hess testified at trial, on direct examination, that he worked at the Wendy's restaurant near Popeye's and was cleaning up the parking lot on the morning of the murder when he saw Cynthia Harrison arrive for work. He testified that he later saw a large black man wearing a Popeye's uniform arrive at Popeye's and bang on the window and door, and was let into the restaurant. Hess identified Hurst in court, and had previously picked him out of a photo lineup, as the man he saw that morning. Hess said he knew Hurst from having seen him "coming and going" at Popeye's and because Hurst had "filled an application out at the Wendy's."

It was not until cross-examination that Hess testified that he had interviewed Hurst. However, Hess also admitted on cross-examination that he was not an assistant manager as he had stated, having failed out of the assistant manager program, and further admitted that he did not have authority to interview applicants. His supervisor, Sun Nguyen, testified at trial that Hess did not interview job applicants or make hiring decisions. At the evidentiary hearing, Hess admitted that he lied at trial when he testified that he had inter-

viewed Hurst and several other unsuccessful applicants for employment at Wendy's.

The postconviction court denied the claim, concluding that the fact that Hess never interviewed Hurst was not "newly discovered" because his cross-examination at trial and the testimony of his supervisor, Sun Nguyen, made clear to the jury that Hess could not have interviewed Hurst. However, Hess never admitted his lie to the jury and Hurst now argues that the admission is, therefore, newly discovered. He further contends that "[h]ad the jury known that Mr. Hess had no basis upon which to recognize and thus identify Mr. Hurst from the photo array, it would have rejected his testimony completely." Assuming that the admission of Hess's misrepresentation is newly discovered evidence, we conclude that the evidence would not probably produce an acquittal on retrial.

First, Hess's admission that he lied about interviewing Hurst does not establish that Hess had no other basis on which to identify Hurst that morning. Hess worked at Wendy's and spent substantial time working in the parking lot. He testified that he saw Hurst from time to time coming and going at Popeye's. Second, even when provided with substantial impeaching evidence concerning Hess's testimony, the jury still found Hurst guilty. Thus, we conclude that Hess's admission, even if newly discovered, does not meet the second prong of Jones because it does not weaken the case against Hurst such that it would probably produce an acquittal on retrial. *See Jones*, 709 So.2d at 521, 526. Moreover, ample other evidence and testimony established Hurst's guilt—discarded shoes and a sock bearing the victim's blood; money concealed by Smith at Hurst's request; a Popeye's deposit slip with Hurst's fingerprints; Hurst's purchase of new tennis shoes at

Wal-Mart the morning of the murder; Hurst's confession to Michael Williams; and Hurst's confession to Lee-Lee Smith. Because Hurst has not established that evidence of Carl Hess's misrepresentation about interviewing Hurst would probably produce an acquittal on retrial, we deny relief on this claim.

C. Ineffective Assistance of Counsel in the Guilt Phase

The postconviction court held an evidentiary hearing on Hurst's claim that in two instances trial counsel was ineffective, and Hurst appeals the denial of relief on those claims. He first contends that trial counsel was ineffective in failing to properly investigate and present evidence, based on information in police reports, that an individual named Andrew Salter was in the vicinity of the Popeye's parking lot on the morning of the murder, between 5:30 and 7:30 a.m., and did not see Hurst in the area. Second, Hurst contends that counsel was ineffective in failing to rebut the prosecutor's implication that Hurst did not tell the police that he went to Wal-Mart the morning of the murder. For the reasons set forth below, we agree with the postconviction court that relief is not warranted on these claims.

Standard of Review for Ineffective Assistance of Counsel Claims

Following the United States Supreme Court's decision in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), this Court has held that for ineffective assistance of counsel claims to be successful, two requirements must be satisfied:

> First, the claimant must identify particular acts or omissions of the lawyer that are shown to be

> outside the broad range of reasonably competent performance under prevailing professional standards. Second, the clear, substantial deficiency shown must further be demonstrated to have so affected the fairness and reliability of the proceeding that confidence in the outcome is undermined. A court considering a claim of ineffectiveness of counsel need not make a specific ruling on the performance component of the test when it is clear that the prejudice component is not satisfied.

Maxwell v. Wainwright, 490 So.2d 927, 932 (Fla.1986) (citations omitted). Because both prongs of the *Strickland* test present mixed questions of law and fact, this Court employs a mixed standard of review, deferring to the circuit court's factual findings that are supported by competent, substantial evidence, but reviewing the circuit court's legal conclusions de novo. *See Sochor*, 883 So.2d at 771-72.

"Judicial scrutiny of counsel's performance must be highly deferential" and there is a strong presumption that trial counsel's performance was not ineffective. *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* The defendant carries the burden to "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* (quoting *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S.Ct. 158, 100 L.Ed. 83 (1955)). "[S]trategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and coun-

sel's decision was reasonable under the norms of professional conduct." *Occhicone v. State*, 768 So.2d 1037, 1048 (Fla. 2000). The Court need not reach both *Strickland* prongs in every case. "[W]hen a defendant fails to make a showing as to one prong, it is not necessary to delve into whether he has made a showing as to the other prong." *Preston v. State*, 970 So.2d 789, 803 (Fla.2007) (quoting *Whitfield v. State*, 923 So.2d 375, 384 (Fla.2005)).

1. Ineffective Assistance of Counsel Claim Concerning Andrew Salter

Within this framework, we turn first to the claim that counsel was ineffective for not identifying, locating, and presenting Andrew Salter to testify that he was in the vicinity for several hours that morning and did not see Hurst or his car. The postconviction court correctly found that trial counsel made a reasonable strategic decision not to pursue investigation of Salter and not to call him at trial, but to use another witness's testimony about Salter's presence on the scene to suggest that a suspicious person was in the area at the time of the crime. At the evidentiary hearing, Hurst's trial counsel testified that he did know of the presence of an individual at the scene and initially attempted to identify that person. However, he explained:

> [F]rankly, it became, in my opinion, an advantage not to know who he was and to simply argue that he was a strange, suspicious black guy out there on a place, and I inferred that it was earlier than it really was, and it gave me an out, which supported my theory and argument in the case.... I didn't want him identified to the jury. I'd rather him be the strange black guy out on a parking lot.

Moreover, we agree with the postconviction court's conclusion that failure to present Salter did not prejudice Hurst because Salter's testimony was not exculpatory. When he testified at the evidentiary hearing, Salter could not say exactly when he arrived at the Wendy's lot. Additionally, he was gone for an uncertain period of time both when he went home and returned and when he went to a nearby Winn-Dixie. He testified that he did not watch the Popeye's parking lot carefully between 7:30 and 8:20 a.m., when the murder likely occurred. Salter testified that he saw no cars in the Popeye's lot that morning—not even the victim's car, which arrived sometime before 7:55 a.m., which he would have seen if he had been carefully observing the lot. Thus, it appears that Salter's testimony would have been of little assistance to Hurst, while the idea of a suspicious, unidentified black male in the vicinity that morning provided more benefit to the defense.

The trial court's finding that counsel made a reasonable, strategic decision not to locate and present Andrew Salter is supported by competent, substantial evidence in the record. Therefore, relief is denied on this claim.

2. Ineffective Assistance of Counsel Claim Concerning Hurst's Trip to Wal-Mart

We turn next to the claim that trial counsel was ineffective for failing to rebut the prosecutor's closing argument, in which he reminded the jury that Hurst never said in his taped statement to police that he went to Wal-Mart on the morning of the murder. The trial court correctly found that the record supported the truth of the prosecutor's statement—Hurst did not tell the investigator on tape that he went to Wal-Mart. Defense counsel Arnold correctly noted that objecting to

this true statement would have been unwarranted and that emphasizing to the jury that Hurst went to Wal-Mart—where he bought new tennis shoes on the morning of the murder—was essentially a double-edged sword. While it supported his sworn alibi notice, which included a reference to Hurst having gone to Wal-Mart to buy tennis shoes, it also supported the State's contention that Hurst needed new shoes because his had been discarded due to blood from the murder.

We agree with the postconviction court that counsel's decision not to object to the prosecutor's argument was a reasonable strategic decision. Because reasonable "strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct," *Occhicone*, 768 So.2d at 1048, relief is denied on this claim.

III. SUMMARILY DENIED GUILT PHASE CLAIMS

Standard of Review for Summary Denial of Rule 3.851 Claims

Under Florida Rule of Criminal Procedure 3.851, an evidentiary hearing must be held on an initial motion for postconviction relief whenever the movant makes a facially sufficient claim that requires a factual determination. *Gonzalez v. State*, 990 So.2d 1017, 1024 (Fla.2008). On an initial rule 3.851 motion, such as in the instant case, to the extent there is any question whether the movant has made a facially sufficient claim requiring a factual determination, the court must presume that an evidentiary hearing is required. *Booker v. State*, 969 So.2d 186, 195 (Fla. 2007). The Court must accept the movant's factual allegations as true to the extent they are not refuted by the record. *Gonzalez*, 990 So.2d at 1024. Because a postconviction court's de-

cision whether to grant an evidentiary hearing on a rule 3.851 motion is ultimately based on written materials before the court, its ruling is tantamount to a pure question of law, subject to de novo review. *See Ventura v. State*, 2 So.3d 194, 197 (Fla.), *cert. denied*, — U.S. —, 129 S.Ct. 2839, 174 L.Ed.2d 562 (2009).

It is under this standard of review that Hurst's supplemental claims will be analyzed. However, it should be remembered that the claims contained in Hurst's supplemental motions are for the most part based on matters that were disclosed during the evidentiary hearing held on the majority of these claims and on follow-up depositions that Hurst was allowed to take for his supplemental claims. In that regard, these claims were not "summarily denied" without any evidentiary hearing, as that phrase is used in its traditional sense. The postconviction court's order stated the supplemental motions were denied without "*another* evidentiary hearing at this time."

After the evidentiary hearing was held in this case, Hurst filed four supplemental motions, which were all denied without an additional evidentiary hearing. Hurst's supplemental claims arose out of the discovery of Investigator Donald Nesmith's field notes at the evidentiary hearing; the prosecutor's testimony at the evidentiary hearing referring to an ex parte conversation he had with trial Judge Tarbuck about whether Lee–Lee Smith would be charged; Carl Hess's admission at the evidentiary hearing that he lied at trial about having interviewed Hurst for a job; and a new claim that trial witness Willie Griffin recanted a portion of his trial testimony.

A. Investigator Donald Nesmith's Field Notes

The issue of Investigator Nesmith's notes will be discussed first. During the evidentiary hearing held on the initial motion for postconviction relief, Sheriff's Investigator Donald Nesmith testified and had with him at the hearing his field notes from the investigation. The notes were provided to the defense for review at that time, although they had previously been found exempt in the public records proceedings, and they were placed in the record. The Sheriff's office later waived any exemption relating to Nesmith's notes, and Hurst was allowed to file a supplemental motion pertaining to information contained in the notes. Hurst filed a supplemental motion claiming that the State's failure to provide the Nesmith notes to the defense prior to trial was a violation of *Brady* and that presentation of evidence in conflict with the notes constituted a *Giglio* violation. Although the postconviction court did not allow an additional hearing on the claim, the court did consider the Nesmith notes and supplemental depositions taken by Hurst's counsel after the initial evidentiary hearing in reaching its decision to deny these claims.

1. Nesmith's Notes Regarding David Kladitis

Hurst's first supplemental motion alleged that Investigator Nesmith's field notes reflect that David Kladitis told him about seeing three or four young black men in the Popeye's parking lot prior to the murder. Hurst alleged that the notes supported Kladitis's evidentiary hearing testimony and that Investigator Nesmith knew Kladitis had seen the men and concealed that information, thus supporting the *Brady* and *Giglio* claims pertaining to Kladitis that were alleged in Hurst's initial motion. We agree with the postconviction court that an additional evidentiary hearing was

not required. The observations made by Kladitis on the morning of the murder were fully explored in the evidentiary hearing at which he testified. Nesmith's field notes pertaining to the Kladitis interview were admitted into evidence at that hearing and were considered by the postconviction court in evaluation of the claims. Because we have concluded that the trial court did not err in denying the *Brady* and *Giglio* claims as they related to undisclosed statements of Kladitis, the existence of the notes supporting those statements does not alter that conclusion. Relief is therefore denied as to the *Brady* and *Giglio* claims based on the notes pertaining to David Kladitis.

2. Nesmith's Notes Regarding Lee–Lee Smith

Hurst alleges a *Brady* violation in regard to the State's failure to disclose Investigator Nesmith's field notes of his interview with Lee–Lee Smith. Hurst also argues that a further evidentiary hearing should have been held relating to Nesmith's notes, which reflected that Smith told Nesmith that "he" got rid of the murder weapon in a dumpster. Hurst contends that the "he" mentioned in the notes was Smith himself, thus showing Smith's complicity in the murder; and that the notes demonstrate an inconsistency between Smith's statement that the murder weapon was put in a dumpster and the fact that a bloody box cutter was found inside Popeye's. After considering the content of the field notes, the trial court denied any further evidentiary hearing and denied the *Brady* claim.

First, the court found that the "he" referred to in the notes was Hurst, not Smith. The field notes of the May 6, 1998, interview with Smith, in the following format, relate Smith's statements to Nesmith as follows:

Tim said

—He was going to kill the person

—for the money

—He said he was going to slice her throat

—Said he was going to come up behind her

—Said he was put [sic] her in freezer

—Said he was going to tie her up then put her in freezer

—Said he was going to take the money

—Get rid of the weapon—in the dumpster behind Popeye's

—Said he got rid of the weapon and mopped all the blood up

We agree with the trial court that "this claim is without merit as the Court finds that 'he' obviously refers to Defendant and not Mr. Smith or some unnamed third party" and "such claim as pled does not amount to a *Brady* violation because it depends on speculation." The notes concerning disposal of the murder weapon do not in any way indicate Smith was confessing to disposing of the murder weapon, and no *Brady* violation has been shown in the failure to disclose the notes for that reason.

However, as to the State's failure to disclose Smith's statements that the murder weapon was disposed of in a dumpster, we conclude that the first two prongs of *Brady* have been established. To establish a *Brady* violation, the defendant must show (1) that favorable evidence, either exculpatory or impeaching, (2) was willfully or inadvertently suppressed by the State, and (3) because the evidence was material, the defend-

ant was prejudiced. *See Strickler*, 527 U.S. at 281-82, 119 S.Ct. 1936. Smith's statement to Nesmith that Hurst got rid of the murder weapon in a dumpster was inconsistent with the State's evidence that the murder weapon was found inside Popeye's. The basis for the postconviction court's denial of relief was stated as follows:

> [I]t is clear from trial counsel's cross-examination [of Smith] that he was provided a transcript of a recorded statement that occurred contemporaneously with the interview session that spawned the notes in question. Trial counsel effectively utilized the information he had regarding the May 6, 1998, interview to impeach Mr. Smith. Therefore, due to the extent of the impeachment described above, and in light of the entire record in this case, Defendant's claim alleging the State improperly withheld Mr. Smith's statement that Defendant "got rid of the murder weapon," fails as a matter of law for lack of prejudice. An evidentiary hearing is not necessary because, even if the allegation is true and correct, the Court finds that it does not reasonably undermine confidence in the verdict, the third element of a legally sufficient *Brady* claim.

However, this conclusion overlooks the fact that Smith was not cross-examined or impeached on anything concerning disposal of the murder weapon. Had the notes been disclosed and counsel been apprised of the fact that Smith told Nesmith that Hurst disposed of the murder weapon, Smith could have been cross-examined on the accuracy of his statement, and his statement could have been compared to the forensic testimony that the murder weapon, a box cutter, was found inside

Popeye's. Because disclosure of the notes would have also allowed counsel to explore this inconsistency by further investigation prior to trial, the field notes concerning Smith's interview should have been disclosed. *See Floyd*, 902 So.2d at 782 ("[W]ithheld information, even if not itself admissible, can be material under *Brady* if its disclosure would lead to admissible substantive or impeachment evidence." (quoting *Rogers v. State*, 782 So.2d 373, 383 n. 11 (Fla.2001))).

However, even if a further evidentiary hearing should have been held to explore the notes, and even if the notes concerning disposal of the murder weapon should have been disclosed, the third prong of *Brady*—prejudice—has not been demonstrated. Other evidence not involving Smith's testimony tied Hurst to the crimes—discarded tennis shoes in Hurst's size, Hurst's purchase of new tennis shoes that day, Michael Williams' testimony that Hurst told him about the murder, Hurst's fingerprint on the bank deposit slip, Hurst's possession of a large amount of money on the day of the murder, and eyewitness testimony of Hess placing Hurst at the scene. Therefore, even if Hurst's counsel had explored the inconsistency between the evidence of the box cutter inside Popeye's and Smith's statement contained in the Nesmith notes that Hurst disposed of the murder weapon, Hurst has not demonstrated a reasonable probability of a different result in his trial, i.e., a probability sufficient to undermine confidence in the outcome. Thus, because our confidence in the outcome of the guilt phase is not undermined by failure to disclose these notes, relief is denied on this claim.

3. Nesmith's Notes Regarding Laura Ussery

Hurst also claimed in his supplemental motion, which was denied without further evidentiary hearing,

that the State committed a *Brady* violation by not disclosing notes of Nesmith's interview with a person named Laura Ussery, who did not testify at trial and was not disclosed to the defense. Hurst's motion alleged that Ussery worked with, and was a good friend of, trial witness Michael Williams and that Michael Williams told Ussery about plans to rob both Popeye's and Taco Bell. Michael Williams testified at trial that he had known Hurst for a long time and that Hurst told him about the murder. Williams testified that Hurst said he had gotten into an argument with a woman and hit her, cut her with a box cutter, and put her in the freezer. Williams also testified that he had heard Hurst and Smith talking about robbing Popeye's on several occasions.

Hurst now contends the Nesmith notes of Williams' statement to Ussery indicate Williams' own plan to participate in the robbery of Popeye's. The notes also stated that Williams told Ussery "his friend didn't do it, the person arrested didn't do it," which Hurst argues contradicts Williams' trial testimony that Hurst confessed to him, and is exculpatory for Hurst. Investigator Nesmith's field notes stated that Ussery reported Williams saying:

> Popeye's was going to get robbed, and someone would end up dead. And Taco Bell too. Said going to rob both store the same day. Said it was going to be one of his friends.... Since the incident at Popeye's 5/2 Michael said his friend didn't do it. The person arrested didn't do it.

In the order denying a further evidentiary hearing and finding the *Brady* claim to be without merit, the postconviction court found that the notes do not indicate Williams planned to be involved in the offense. We

conclude that although the trial court was correct that the notes do not indicate Williams planned to participate in the robberies, the notes do contain information that defense counsel could have utilized in an attempt to impeach Williams' trial testimony and to investigate the issue of other possible participants in the crime. Because the notes could have led to impeachment evidence, they constitute *Brady* material and should have been disclosed.

The postconviction court ruled that the notes would not be admissible because they are hearsay not subject to any exception and do not involve an inconsistent statement or material fact to be used for impeachment at trial. However, as we stated earlier, information that is not itself admissible can still be material under *Brady* if it would lead to admissible substantive or impeachment evidence. *Floyd*, 902 So.2d at 782 (citing *Rogers*, 782 So.2d at 383 n. 11). We made clear in *Rogers* that even if the reports at issue were not admissible, "they can still serve as the basis for Rogers' *Brady* claim to the extent he could have investigated and used the information contained in the reports." 782 So.2d at 383 n. 11. Even though we conclude that the notes should have been disclosed, we now must address the question of prejudice.

Hurst has not demonstrated "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Youngblood*, 547 U.S. at 870, 126 S.Ct. 2188 (quoting *Strickler*, 527 U.S. at 280, 119 S.Ct. 1936). A reasonable probability of a different result "is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052; *see also Strickler*, 527 U.S. at 290, 119 S.Ct. 1936. Even if the notes had been disclosed and Williams had been

cross-examined about his comments to Ussery or if defense counsel had used the notes to investigate who else may have been planning to rob Popeye's and Taco Bell, we find no reasonable probability that the result of the guilt phase portion of the trial would have been different. That evidence would not have rebutted all the other evidence directly connecting Hurst to the crime, including testimony by Smith that Hurst confessed to murdering Harrison, Hurst's fingerprints on the deposit slip, the discarded bloody tennis shoes, the newly purchased tennis shoes, the possession of money on the morning of the murder, and the eyewitness identification of Hurst at the scene.[7] We need not reach the question of whether the Ussery notes could have led to evidence undermining our confidence in imposition of the death sentence in this case, because we vacate that sentence and remand for a new sentencing proceeding. Relief on this claim is therefore denied.

4. Nesmith's Notes Regarding Michael Williams

Hurst's supplemental motion also alleged that the State committed a *Brady* violation when it withheld Investigator Nesmith's field notes pertaining to the interview directly with Michael Williams. The notes show that Williams reported to Nesmith that Hurst told him he needed to get his car fixed, which is consistent with Hurst's alibi on the morning of the murder. The supplemental motion also alleged that the field notes show Williams told Nesmith that Hurst would always do what Smith told him, and that Smith told Michael Williams, "We got that motherfucker," referring

---

[7] We also note that when Investigator Nesmith interviewed Michael Williams directly, Williams did not report that Hurst was innocent or that some other friends participated in or committed the crimes.

to the murder. Hurst contends that all this information was exculpatory and impeaching of other witnesses' testimony and should have been disclosed.

The postconviction court denied the claim without another hearing and held that a *Brady* violation was not demonstrated regarding Williams' statements that Hurst needed to get his car fixed, because that testimony was cumulative to a number of other witnesses who testified to that same fact and would not have had any material effect on the outcome. As the trial court found, the jury heard evidence through Lola Hurst, Marie Hurst, Patti Hurst, Bertha Bradley, Timothy Bradley, and Hurst himself, in his recorded statement, that he had car trouble on the morning of the murder and needed to get his car fixed.

As to that portion of the field notes that indicates Williams told Nesmith that Hurst would do whatever Smith told him to do, the postconviction court concluded that counsel already knew that fact from depositions taken in the case. The court stated: "These statements during the deposition are substantially similar to the information Defendant now alleges was withheld by the State." The information in the notes was also cumulative to testimony in the penalty phase from Hurst's mother that Hurst would do whatever Smith wanted him to do. The undisclosed notes concerning Michael Williams' comments about Hurst doing whatever Smith wanted, and about Smith's vague statement that "we got that motherfucker" even if presented in the guilt phase, do not satisfy the prejudice prong of *Brady*.

Because the failure of the State to disclose the Nesmith notes relating to Michael Williams' interview does not undermine our confidence in the result of the guilt phase of Hurst's trial, relief is denied on this claim.

5. Nesmith's Notes Regarding Carl Hess

Hurst's supplemental motion also alleged a *Brady* claim and a *Giglio* claim based on Nesmith's field notes concerning Carl Hess. Hurst claims the notes demonstrate that Hess gave undisclosed information to Nesmith that would have contradicted Hess's trial testimony, as well as the trial testimony of David Kladitis. The motion claimed the timeline was vastly different in the Hess notes concerning when the victim arrived at work and would also have impeached Hess's trial testimony that he interviewed Hurst, because the notes said Hess "saw suspect apply for job" at Wendy's. The supplemental motion further alleged that Nesmith's notes of his interview with Hess contain impeachment evidence because the notes state that Hess said Hurst's car was "possibly blue" and at trial stated the car conclusively was blue.

The postconviction court denied a further evidentiary hearing on this supplemental claim, and denied the *Brady* and *Giglio* claims, stating:

> Clearly, the claimed false testimony [of Hess] was subjected to ample impeachment at trial. Any material effect the alleged false testimony would have had on the opinion of the jury was negated by trial counsel[ ] through impeachment.

Because Hess testified at the evidentiary hearing, and because the trial court considered the field notes relating to his interview with Investigator Nesmith, the trial court did not err in denying the claim without an additional evidentiary hearing. Further, we agree that Hurst has failed to establish either a *Brady* or a *Giglio* violation by the State's failure to disclose Nesmith's field notes of his interview with Hess.

The fact that Hess told Nesmith he "saw suspect apply for a job" is not clearly inconsistent with or impeaching of Hess's trial testimony that he knew Hurst because Hurst applied for a job at Wendy's. In Hess's direct examination, Hurst said only that he knew Hurst from having seen him coming and going and because Hurst had "filled an application out at Wendy's." Hess was severely impeached during cross-examination and his additional claim to have "interviewed" Hurst was shown to be unlikely, if not actually false, by the testimony of his supervisor, Sun Nguyen.

Nor does it appear that the field notes contain exculpatory or impeachment information relating to the timeline in which Hess said he saw the victim arrive. Nesmith's notes indicate Hess said he saw Harrison arrive at 7:15 a.m., while at trial he testified he saw her arrive "anywhere between 7:00 and 8:30." This timeline set forth in the Nesmith notes is not inconsistent with Hess's trial testimony and does not provide any exculpatory or impeachment evidence. Hurst also argues that the notes concerning when Hess saw Harrison arrive would impeach the testimony of Kladitis. This is also incorrect. Kladitis testified at trial that he was next to the Popeye's parking lot and saw Harrison drive by at "7:20—7:15 to 7:20." At the evidentiary hearing, Kladitis testified that he saw Harrison drive by at "7:20—7:15 to 7:20." Therefore, the Nesmith note of Hess's observation of the victim's arrival at 7:15 a.m. is not inconsistent with his trial testimony and is actually consistent with the trial testimony of Kladitis.

The State's failure to disclose the notes regarding Hess is not a *Brady* violation because the notes are not exculpatory or impeaching and do not provide any basis to undermine our confidence in the verdict. Nor does the information in the notes demonstrate a *Giglio* viola-

tion, because it does not indicate that the State presented, or failed to correct, any false testimony at trial. Moreover, because of the strength of other evidence tying Hurst directly to the murder, any error in failure to disclose the Hess notes cannot reasonably be said to have contributed to Hurst's conviction. Therefore, relief is denied on this claim.

B. *Anderson* Claim Based on Testimony of Hess

Hurst claims a violation of *Anderson v. State*, 574 So.2d 87 (Fla.1991), contending that the State prosecuted him on an indictment obtained after Carl Hess lied to the grand jury by testifying that he interviewed Hurst. In *Anderson*, we held that "due process is violated if a prosecutor permits a defendant to be tried upon an indictment which he or she knows is based on perjured, material testimony without informing the court, opposing counsel, and the grand jury." *Id.* at 91. The postconviction court denied the claim, finding that the evidence did not support the claim that Hess lied before the grand jury. We agree with this assessment.

Hess testified at a postconviction evidentiary hearing July 9, 2004, that the matter of whether he interviewed Hurst "did not come up" when he testified before the grand jury. The following colloquy took place:

> Q. [defense counsel]: Do you recall if you testified at the grand jury that you interviewed Mr. Hurst?
>
> A. It never came up.
>
> ....
>
> Q. In any event, if the record reflects that you did testify at the grand jury and you testified

> that you interviewed Mr. Hurst, that's not true?
>
> A. It never came up.

We are aware that Hess made a statement in his September 14, 1998, deposition prior to the trial in this case, which could be interpreted as indicating he told the grand jury, falsely, that he interviewed Hurst. Hess testified in that deposition as follows:

> Q. [defense counsel] How long was your interview with the gentleman you chose not to recommend?
>
> A. About twenty minutes, half an hour.
>
> Q. When the police asked you about him, did they ask you whether there was any paperwork that he might have filled out?
>
> A. No, ma'am.
>
> Q. Did you think of the possibility that there might have been some paperwork and whether to retrieve it or not?
>
> A. No, they didn't ask me about that. Actually, I didn't tell them I interviewed him until I was in front of the grand jury. You know, I said I knew him personally.

However, at the *Huff* hearing held in this postconviction proceeding on March 18, 2005, defense counsel expressly rejected any reliance on Hess's deposition for this claim.

Even if Hess gave false testimony about interviewing Hurst when he testified before the grand jury, relief would not be warranted, because the testimony was not material in any respect that would have affected

the indictment issued in the cause. We held in *Anderson* that relief will not be granted if the testimony, even if false in part, "was not false in any material respect that would have affected the indictment." *Id.* at 92; *see also Evans v. State*, 808 So.2d 92, 101 (Fla.2001) (same, citing *Anderson*). In this case, Hess had other bases to support his identification of Hurst. Hess provided Hurst with an application for Wendy's employment and was later handed the completed application by Hurst. Hess also worked in the parking lot of Wendy's where he saw Hurst coming and going at Popeye's. Additionally, Hess's testimony was not the only evidence heard by the grand jury before the indictment was handed down. Michael Williams testified before the grand jury, telling them that Hurst confessed that he cut the victim with a box cutter. Lee–Lee Smith testified before the grand jury as well. Therefore, trial court did not err in denying Hurst's *Anderson* claim without another evidentiary hearing, and relief is denied on this claim.

C. Alleged Ex Parte Communication

Hurst next contends that that an improper ex parte conversation occurred during his trial when Judge Tarbuck asked prosecutor Rimmer if Lee–Lee Smith would be charged in connection with the Popeye's crimes. This claim arose after Rimmer testified at the initial evidentiary hearing, "I never even really made a decision to [charge Smith] until the case was over and Judge Tarbuck called me up to the bench and asked me why Lee–Lee had not been charged." Rimmer could not recall exactly when the conversation occurred, and testified that it could have occurred before or after the penalty phase. Hurst was allowed to depose Judge Tarbuck, who stated that he did not recall witness Lee–Lee Smith and did not recall any conversation with the

prosecutor about Smith being charged. Rimmer was also deposed on the issue approximately a year after his evidentiary hearing testimony and testified that he thought the conversation with Judge Tarbuck probably occurred after the verdict, at the conclusion of Hurst's guilt phase case, and confirmed that Hurst's defense counsel was not present at the conversation.

The postconviction court, with a different circuit judge now presiding, denied the claim of improper ex parte communication without a further evidentiary hearing and concluded:

> Defendant has failed to establish that he was deprived of a neutral, detached judge. The Court finds that the communication in question was limited to matters concerning Lee–Lee Smith and had no bearing on the judge's treatment of Defendant either during trial or during sentencing. Defendant is not entitled to relief as to this claim.

We agree that the conversation was not an improper substantive ex parte communication about the merits of Hurst's case and that it in no way prejudiced Hurst or deprived him of a neutral, detached judge.

Canon 3 B(7) of the Code of Judicial Conduct provides in pertinent part that "[a] judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding." We have recognized that "there is nothing 'more dangerous and destructive of the impartiality of the judiciary than a one-sided communication between a judge and a single litigant.'" *Randolph v. State*, 853 So.2d 1051, 1057 (Fla.2003) (quoting *Spencer v. State*, 615 So.2d 688, 691 (Fla. 1993)). Without

question, an ex parte communication in a capital case in which the trial court delegates the job of evaluating sentencing factors and preparation of the sentencing order to the prosecution is improper and will require reversal. *See, e.g., State v. Riechmann*, 777 So.2d 342, 351 (Fla.2000). That is not what occurred here.

Even where an improper communication occurs, reversal is not automatic. In *Randolph*, we found that an improper ex parte communication took place between the judge and the prosecutor, who were discussing the wording of the sentencing order, but agreed with the postconviction court that a new trial was not necessary because "Randolph's right to a neutral judge was not violated by the improper ex parte communication in this case." *Randolph*, 853 So.2d at 1057. We have also considered the importance of the nature of the contact between the judge and the prosecutor in evaluating whether an ex parte communication is improper. *See id.* at 1058; *Card v. State*, 652 So.2d 344, 346 (Fla.1995) (noting that the postconviction court should consider the nature of the contact between the trial judge and the prosecutor).

In the instant case, the nature of the contact was solely related to whether Smith would be charged in a separate prosecution—a matter not directly involving Hurst or the charges against him. If anything, the exchange indicates concern about Smith's culpability in the crime, a concern that is not prejudicial to Hurst or inconsistent with Judge Tarbuck's neutrality in Hurst's case. In evaluating a claim of improper ex parte communication in *Tompkins v. State*, 872 So.2d 230 (Fla. 2003), we explained:

> Tompkins is not entitled to a new penalty phase because he has not demonstrated that he

> was denied his right to a neutral, detached judge or that Judge Coe failed to independently weigh the aggravating and mitigating circumstances.

Id. at 245. Similarly, In this case, no claim has been made, and we see no evidence in the record, that the ex parte communication concerning Smith deprived Hurst of a neutral, detached judge. Because there is no basis to conclude that Hurst was deprived of a neutral, detached judge or that any of the trial judge's rulings or decisions were prejudicially affected by the communication, relief is denied on this claim.

D. Willie Griffin's Affidavit and Testimony

Hurst next contends the trial court erred in summarily denying his third supplemental motion, claiming that a new trial should be granted because trial witness Willie Griffin recanted his trial testimony that Hurst confessed. Hurst also contends the postconviction court erred in denying his motion to perpetuate Griffin's testimony. We agree that the trial court erred in denying the motion to perpetuate testimony. Nevertheless, as we explain below, we conclude that relief is not warranted on this claim.

Griffin testified at Hurst's jury trial that when he was in jail with Hurst in Escambia County after the Popeye's murder, Hurst told him, "I did that swine, and 'F' the rest of them." He testified that Hurst did not show any remorse for the crime. Referring to the murder victim, Griffin testified that Hurst told him "they didn't get along in the first place, and she was like slow or something like that, like something was wrong with her mentally." Griffin admitted at trial that he tried unsuccessfully to get a visitation favor from the prose-

cutor and that he had also volunteered to testify against another inmate.[8]

Postconviction counsel obtained a sworn affidavit in which Griffin stated that Hurst actually professed his innocence several times; that Griffin's testimony at trial that Hurst said, "I did that swine" was fabricated; and that when Hurst actually said, "Fuck that swine," Griffin was not sure to whom Hurst was referring. The affidavit also averred that Griffin's testimony was "entirely based on emotion, based on what I was told by the State and law enforcement."

The trial court initially granted an evidentiary hearing on the claim, but postconviction counsel could not secure the attendance of Griffin, who was a federal prisoner at Fort Dix. Counsel's unsuccessful attempts to secure Griffin's appearance resulted in his advising the court that, due to the Interstate Agreement on Detainers, only the prosecuting authority could obtain Griffin's presence in Florida. The State did not agree to assist in obtaining Griffin's presence, expressing concern about setting "a precedent where the State is essentially responsible for assisting the defense to get their witness."

Hurst then filed a sworn motion under Florida Rule of Criminal Procedure 3.190(j)(1) asking the court to perpetuate Griffin's testimony, with an alternative request to compel the State's assistance in obtaining Griffin's appearance. That motion was denied. Hurst then attempted to support his claim with the affidavit by Griffin, but the court concluded that the unauthenticat-

---

[8] Additionally, Anthony Williams testified at the postconviction evidentiary hearing that Griffin was in jail with him and told him it was possible he (Griffin) would get some help on his own case if he testified against Hurst.

ed affidavit in which Griffin recanted part of his trial testimony would be inadmissible and denied the evidentiary hearing based on the fact that Griffin's attendance could not be secured. The court stated, "Postconviction counsel is unable to obtain physical custody of the witness from federal custody. As such, this Court finds that the witness is unavailable to testify at an evidentiary hearing." The postconviction court also denied the written proffer containing the affidavit.

Rule 3.190(j) "applies to trials, not to postconviction proceedings where discovery is limited and substantial discretion is afforded the trial court," and "[t]he decision whether to grant a motion to perpetuate testimony lies within the discretion of the trial court." *Riechmann v. State*, 966 So.2d 298, 310 (Fla.2007) (quoting *Cherry v. State*, 781 So.2d 1040, 1054 (Fla. 2000)). We found no abuse of discretion in denial of a motion to perpetuate testimony in *Riechmann*, where the motion was not under oath or accompanied by sworn affidavits and there was no assertion as to the exact location of the witness. In the present case, however, Hurst's sworn motion met the requirements of the rule and Griffin's exact location was stated in the motion. The court denied the motion to perpetuate testimony, citing the "speculative nature of Defendant's pleadings" and because the court was "not convinced that Griffin could have been held accountable for his proposed deposition testimony." The court also agreed with the State that "the State should not have to be responsible for retrieving Defendant's witnesses." After rejecting Hurst's requests for assistance in obtaining the testimony of Griffin, the court found Hurst had failed to present reliable admissible evidence that Griffin had recanted, thus denying the claim. Because Hurst's motion was in proper form and was relevant to his claim of newly dis-

covered evidence, and because his counsel had no other way to secure Griffin's testimony, we conclude that the trial court abused its discretion in denying the motion to perpetuate Griffin's testimony. Nevertheless, we conclude that even if Griffin's testimony had been obtained and he had testified in accord with his affidavit, relief would not be warranted in this case.

Because the affidavit is not a clear recantation of all Griffin's trial testimony, his partial recantation would not be newly discovered evidence of such a nature that it would probably produce an acquittal on retrial, as required by *Jones*, 709 So.2d at 521. Nor does it appear that it would "weaken[ ] the case against [the defendant] so as to give rise to a reasonable doubt as to his culpability." *Id.* at 526 (quoting *Jones v. State*, 678 So.2d 309, 315 (Fla. 1996)). Even without Griffin's testimony, ample evidence remained upon which the jury could find Hurst guilty, including his confession to Lee–Lee Smith, Hurst's fingerprints on the bank deposit slip, his possession of a large sum of money on the morning of the murder, and his disposal of large-size tennis shoes bearing indications of blood, along with his purchase of new tennis shoes on the morning of the murder. Thus, relief is denied on this claim.

IV. PENALTY PHASE CLAIM AFTER EVIDENTIARY HEARING

Ineffective Assistance of Counsel in Investigation and Presentation of Mental Mitigation in the Penalty Phase

Hurst contends that trial counsel failed to adequately investigate and present mental mitigation evidence of his low IQ, borderline intellectual functioning, and possible organic brain damage caused by fetal alcohol syndrome, all of which would have established stat-

utory and nonstatutory mitigation and could have provided the jury with a basis to recommend life.[9] For the reasons set forth below, we agree that trial counsel was ineffective in failing to investigate and present evidence of mental mitigation in this case. Accordingly, we vacate the sentence of death and remand for a new penalty phase proceeding.

Standard of Review

As explained earlier, under the deficiency prong of *Strickland*, the defendant must establish that counsel's performance was deficient, i.e., that counsel's performance was "outside the broad range of reasonably competent performance under prevailing professional standards." *Maxwell*, 490 So.2d at 932. "[T]here is a strong presumption that trial counsel performed effectively," *Lynch*, 2 So.3d at 56, and in determining deficiency, "[n]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel." *Id.* at 81 (quoting *Strickland*, 466 U.S. at 688–89, 104 S.Ct. 2052). Furthermore, the Court remains "cognizant of the danger in assessing the adequacy of counsel's investigation and preparation through the distorting lens of

---

[9] When the postconviction motion was filed in 2003, Hurst also alleged a claim under *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), but has not appealed denial of that claim. *Atkins* held that it is unconstitutional to execute a person who is mentally retarded. *Id.* at 321, 122 S.Ct. 2242. In this regard, "[b]oth the statute and our rule define mental retardation as 'significantly subaverage general intellectual functioning *existing concurrently with* deficits in adaptive behavior and manifested during the period from conception to age 18.' " *Jones v. State*, 966 So.2d 319, 326 (Fla.2007) (quoting § 921.137(1), Fla. Stat. (2005)). *See* § 921.137(1), Fla. Stat. (2008); Fla. R.Crim. P. 3.203(b) (effective Oct. 1, 2004).

hindsight and take[s] care to evaluate the performance through counsel's perspective at the time." *Blackwood v. State*, 946 So.2d 960, 973 (Fla.2006) (citing *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052). Nevertheless, it is axiomatic that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691, 104 S.Ct. 2052. We reiterate that trial counsel's "strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct." *Occhicone*, 768 So.2d at 1048.

Under the prejudice prong of *Strickland*, the defendant must prove that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *White v. State*, 964 So.2d 1278, 1285 (Fla.2007) (quoting *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052). Importantly, that reasonable probability is evaluated and expressed in terms of "a probability sufficient to undermine confidence in the outcome." *Id.*

We begin with the premise that "an attorney's obligation to investigate and prepare for the penalty portion of a capital case cannot be overstated because this is an integral part of a capital case." *State v. Pearce*, 994 So.2d 1094, 1102 (Fla.2008). In order to determine if trial counsel fulfilled his obligation to investigate and prepare for the penalty phase in this case, we first examine the deficiency prong of the *Strickland* test for ineffective assistance of counsel.

A. Deficiency

During the penalty phase of trial, no expert testimony of mental mitigation was presented. Defense counsel did not have Hurst examined by a mental health expert prior to the penalty phase, even though Hurst's former counsel, an assistant public defender, had filed a motion for a mental evaluation. When the court took up the motion, Hurst's trial attorney stated that he did not see any reason to have Hurst examined. Thus, the motion for mental evaluation was denied and no mental evaluation was ever done. Nor did counsel obtain and present school records of the defendant, who was just nineteen at the time of the crime. The records would have shown that Hurst had a low IQ, was in special education classes, and dropped out of school after repeating tenth grade.

Hurst argues that, on proper investigation and mental evaluation of the defendant, trial counsel could have discovered the same statutory and nonstatutory mental mitigation that was presented at the evidentiary hearing. In the order denying postconviction relief, the postconviction court noted that "Defendant has now been examined by a mental health expert and both statutory and nonstatutory mitigation is available for the Court's consideration." However, the postconviction court held that defense counsel was not ineffective in failing to have Hurst examined by a mental health expert because counsel followed the wishes of his client not to be examined; counsel did not observe anything about Hurst that would have required a mental health evaluation; and counsel believed that mental mitigation would have conflicted with his claim of innocence in the guilt phase.

Defense counsel Raymond Glenn Arnold testified that he "didn't think that a shrink would find a mental problem," and that he believed he was going to win the guilt phase.[10] He explained to the postconviction court, "I had to prepare for the penalty phase, even though at that time I thought I was going to win the guilt phase." He then testified concerning his discussion of mental mitigation for use in the penalty phase with Hurst, stating:

> [I]f they convict you, I've got to put on testimony about . . . mitigation. . . . I told him that one of the ways of doing that was through mental health testimony . . . and I told him I'd have to have a shrink examine him. And it really didn't go a heck of a lot further than that. It was basically, no, I don't want to do that. . . . And Tim wasn't overly helpful in that particular area, by the way.

Counsel contended that he was simply following the wishes of his client not to be examined. This contention would be more persuasive if defense counsel had actually given Hurst a complete explanation of the purpose of mitigation and the benefit of having a psychological examination to uncover potential mental mitigation—and if Hurst had then made an informed decision to forego all mental mitigation. We have held that "[a]lthough a defendant may waive mitigation, he should not do so blindly." *Pearce*, 994 So.2d at 1102. In this case, trial counsel's explanation that he told Hurst he would have to have him examined by a "shrink" does not rise to the

---

[10] Arnold testified that he was experienced in trying capital cases but because he won the guilt phase portions of all the capital cases he tried, except one, he had only handled one prior penalty phase proceeding.

level of an explanation why a psychological evaluation would be necessary or helpful in the penalty phase of a capital trial. Moreover, Hurst's simple statement that he did not want to be examined cannot be construed as a clear directive to trial counsel to forego all mental mitigation. Counsel did not make any investigation to determine whether a decision to forego mental mitigation, if such was made by Hurst, was fully informed.

The evidence presented at the evidentiary hearing established that significant mental mitigation was available and could have been presented in the penalty phase of trial if Hurst had been examined by a mental health expert. Psychologist Dr. Valerie McClain testified that Hurst was a below-average student in special education courses, that he dropped out of school after repeating the tenth grade, and had an IQ score of 70 on the Wechsler Abbreviated Scale of Intelligence test, which she administered. On the full Wechsler Intelligence Scales test, administered by an employee of State's witness Dr. James Larson, Hurst demonstrated a full scale IQ of 78. Dr. McClain testified that Hurst exhibited mental deficits, especially in the area of memory and reasoning, and verbal fluency deficits, as well as below average adaptive functioning skills.[11] Testing also disclosed that Hurst was functioning at only a fourth-grade level in reading and a fifth-grade level in math. In her opinion, neuropsychological testing suggested Hurst suffered from brain damage that was consistent with fetal alcohol syndrome caused by

---

[11] Dr. McClain also administered the Miller Forensic Assessment of Symptoms test, the Trailmaking test, The State Trait Anger Expression Inventory–2 test, the Controlled Oral Word Association test, the Rey Complex Figure test, the Rey Auditory Verbal Learning test, and the Rey15 Item test. She interviewed Hurst's mother and father, as well as his sister.

his mother's heavy drinking during pregnancy, although a formal diagnosis of fetal alcohol syndrome would need to be made by a physician.

In *Jones v. State*, 998 So.2d 573 (Fla.2008), we explained:

> Where available information indicates that the defendant could have mental health problems, "such an evaluation is 'fundamental in defending against the death penalty.' " *Arbelaez*, 898 So.2d at 34 (quoting *Bruno v. State*, 807 So.2d 55, 74 (Fla.2001) (Anstead, J., concurring in part and dissenting in part)).

Id. at 583. This type of investigation is especially critical where, as here, counsel believed Hurst was waiving his right to present such mental mitigation by merely indicating that he did not want to be examined by a "shrink." Moreover, a reasonable investigation into mental mitigation is part of defense counsel's obligation where there is any indication that the defendant may have mental deficits.

Although trial counsel testified that he personally saw nothing that would have required a psychiatric or psychological examination, in assessing the reasonableness of counsel's investigation and decision not to obtain a mental health evaluation in this case, the Court "must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins v. Smith*, 539 U.S. 510, 527, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). We conclude that the evidence and information available to Hurst's counsel was sufficient to place him on notice that further investigation of mental mitigation was necessary; conse-

quently, his decision not to pursue it was not reasonable under the circumstances of this case.

The record established that counsel was presented with information from Hurst's family that indicated he probably had borderline intellectual functioning and was emotionally immature. Counsel could easily have discovered that Hurst was in special education classes, had repeated tenth grade, and dropped out of school, just as Dr. McClain discovered. Similarly, reasonable investigation by counsel based on information suggesting that Hurst had a low IQ would likely have disclosed, just as the psychologists testified at the evidentiary hearing, that Hurst had an IQ of somewhere between 70 and 78.

Dr. McClain was also of the opinion that Hurst exhibited organic brain damage based on fetal alcohol syndrome. According to his evidentiary hearing testimony, trial counsel did know that Hurst's mother drank heavily during her pregnancy. He also knew that Hurst might have suffered from fetal alcohol syndrome because of his mother's alcohol abuse, but counsel appeared to be unsure how he could have used that fact in mitigation. As to possible mitigation of brain damage caused by fetal alcohol syndrome, counsel said:

> It was my understanding—in fact, one time I even thought about fetal alcohol syndrome. But, no. It's so difficult to establish that defense. I did not use it, no. I didn't think it worthwhile frankly.

This comment by counsel indicates some confusion over the purpose of evidence to be used in mitigation versus evidence to be used as "a defense" to the murder. Reasonable investigation of the ramification of the fact that Hurst's mother drank heavily during her pregnancy

would have turned up evidence similar to that found by Dr. McClain, indicating that Hurst probably had organic brain damage resulting from fetal alcohol syndrome. At a minimum, the information possessed by trial counsel provided a reasonable basis to request an examination of Hurst to explore the question of fetal alcohol syndrome and to determine his IQ level at the time of the crime. Mitigation of this significance, indicating that Hurst's IQ was possibly as low as 70 and that he likely had organic brain damage, would have been significant, relevant mental mitigation, including statutory mitigation, in a case in which the only mitigation that was presented was insignificant.

Recently, in *Parker v. State*, 3 So.3d 974 (Fla.2009), we reversed for a new penalty phase where counsel presented only "bare bones" mitigation at trial and where substantial mental mitigation and mitigation concerning Parker's childhood were discovered and presented at the postconviction evidentiary hearing. *Id.* at 984. The Court stated, "The ABA Guidelines provide that investigations into mitigating evidence 'should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.' " *Id.* at 984–85 (quoting the American Bar Association, *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* guideline 11.4.1(C), at 93 (1989)). "Among the topics that counsel should consider presenting in mitigation are the defendant's medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences." *Parker*, 3 So.3d at 985 (citing ABA guideline 11.8.6, at 133). In this case, counsel not only failed to investigate mental mitigation

reasonably suggested by available evidence, he also failed to present the relevant features of Hurst's educational background and school records, which showed Hurst was a special education student with borderline intelligence who dropped out of school after repeating the tenth grade.

The State urges that defense counsel had a reasonable strategy to only present Hurst as a good person and that the mental mitigation would have conflicted with Hurst's guilt phase claim of innocence. It is true that we have held that a penalty phase strategy of "humanizing" or showing only the good characteristics of a defendant is not necessarily deficient where the strategy is " 'dictated' by the defendant's insistence on his innocence." *Sliney v. State*, 944 So.2d 270, 285 (Fla.2006) (citing *Rutherford v. State*, 727 So.2d 216, 223 (Fla.1998)). However, in both *Sliney* and *Rutherford*, the trial attorney had a sound reason for believing the omitted mitigation would have been harmful in some respect to the defendant's case.

In *Sliney*, the defendant was examined by a mental health expert prior to the penalty phase, and the report supplied to counsel contained substantial harmful information about the defendant and would have been inconsistent with other mitigation. *Id.* at 283; *see also Sexton v. State*, 997 So.2d 1073, 1084 (Fla.2008) (holding that counsel was not ineffective in failing to present mental mitigation that would have opened the door to testimony that the defendant was a sadistic sexual psychopath); *Hodges v. State*, 885 So.2d 338, 348 (Fla.2004) ("In light of evidence demonstrating that counsel pursued mental health mitigation and received unusable or unfavorable reports, the decision not to present the experts' findings does not constitute ineffective assistance of counsel."); *Gaskin v. State*, 822 So.2d 1243, 1248 (Fla.

2002) ("Trial counsel will not be held deficient when she makes a reasonable strategic decision to not present mental mitigation because it could open the door to other damaging testimony."); *Haliburton v. Singletary*, 691 So.2d 466, 471 (Fla.1997) (counsel not deficient for not presenting mental mitigation of brain damage where testimony would have disclosed that Haliburton was extremely dangerous and likely to kill again). Notable in the foregoing cases is the fact that counsel obtained mental evaluations and then made the decision that their presentation would be more harmful than helpful.

In *Rutherford*, we held that defense counsel properly relied on a strategy of "humanizing" the defendant rather than exposing his alcoholism and anxiety disorder, which were noted in pretrial mental evaluations. *Rutherford*, 727 So.2d at 224. In so holding, we distinguished between counsel's informed actions in *Rutherford* and those cases in which counsel made a decision to forego mental mitigation without making any meaningful investigation. *Id.* at 223. One such example is *Rose v. State*, 675 So.2d 567 (Fla.1996), where we reversed because trial counsel's mitigation decisions were "neither informed nor strategic" and "there was no investigation of options or meaningful choice." *Id.* at 572–73. In *Rose*, counsel failed to uncover mitigation evidence that Rose was a slow learner with an IQ of 84, he suffered from organic brain damage, and his ability to appreciate the criminality of his conduct was impaired. *Id.* at 571.

In this case, no sound basis appears for Hurst's defense counsel to have failed to investigate and present mitigation evidence of Hurst's borderline intelligence, which was at a lower level than in *Rose*, possible organic brain damage similar to that in *Rose*, and other men-

tal mitigation. The evidence did not carry with it any harmful factors, such as in *Sliney* and *Rutherford*, which could have defeated the effect of the mitigation. No evidence was presented to show that Hurst's mental mitigation would have opened the door to any damaging testimony.

In his mitigation strategy in this case, defense counsel relied mainly on the fact that his guilt phase case was based on a claim of innocence. He testified that he believed presentation of any mitigation other than the fact that Hurst was a good person would have been inconsistent with that theory. However, because counsel never had Hurst examined and could not know what a mental health expert might discover, he could not make an informed tactical decision that the mental mitigation would be inconsistent with the defense or with other mitigation. Moreover, presentation of the mental mitigation discovered in this case—that Hurst had borderline intellectual functioning, cognitive deficits, and possible brain damage—would not have been an admission that he committed the murder but would have been *consistent* with and supportive of the other mitigation that Hurst was slow, emotionally immature, and a follower.

Even if counsel did not want to present mental mitigation to the jury because of concerns relating to credibility or inconsistency, there is no explanation how presenting such mitigation at the *Spencer*[12] hearing would have been detrimental. Counsel's decision to forgo any mental evaluation resulted in his failure to

---

[12] *Spencer v. State*, 615 So.2d 688, 691 (Fla.1993) (holding that the trial court should conduct a hearing to allow the parties to be heard, including the defendant in person, and to allow presentation of additional evidence before sentencing).

discover significant mental mitigation, as well as educational history, that could have been presented as mitigation either to the jury or just to the trial court. In fact, no additional evidence was presented at the *Spencer* hearing held April 17, 2000.

We reiterate the principle that not every capital defendant requires a mental evaluation, but where, as here, available information indicates that the defendant could have significant mental health problems, counsel will be deficient in failing to investigate the defendant's mental condition for purposes of mitigation. Because there was no reasonable, strategic reason not to present any mental mitigation during the penalty phase of Hurst's trial, and a reasonable investigation would have disclosed statutory and nonstatutory mitigation that could have shored up the otherwise weak mitigation, counsel was deficient in his performance under the first prong of *Strickland*. This does not end our inquiry, however. We now examine whether counsel's deficient performance prejudiced Hurst in the penalty phase of his trial.

B. Prejudice Prong

Penalty phase prejudice under the *Strickland* standard is measured by whether the error of trial counsel undermines this Court's confidence in the sentence of death when viewed in the context of the penalty phase evidence and the mitigators and aggravators found by the trial court. This Court has explained:

> In assessing prejudice, we reweigh the evidence in aggravation against the totality of the mental health mitigation presented during the postconviction evidentiary hearing to determine if our confidence in the outcome of the

> penalty phase trial is undermined. *See Rutherford v. State*, 727 So.2d 216, 223 (Fla.1998) (stating that in assessing prejudice "it is important to focus on the nature of the mental mitigation" now presented); *see also Wiggins*, 539 U.S. at 534, 123 S.Ct. 2527 ("In assessing prejudice, we reweigh the evidence in aggravation against the totality of available mitigating evidence.").

Hannon v. State, 941 So.2d 1109, 1134 (Fla.2006). In the present case, the facts of the murder established that it was especially heinous, atrocious or cruel, an aggravator that was found and given great weight by the trial judge. The facts also established that the murder was committed during a robbery, an aggravator that was also found and given great weight by the trial judge.

Nevertheless, "we have consistently recognized that severe mental disturbance is a mitigating factor of the most weighty order, and the failure to present it in the penalty phase may constitute prejudicial ineffectiveness." *Rose*, 675 So.2d at 573 (citations omitted); *see also Phillips v. State*, 608 So.2d 778, 783 (Fla.1992) (prejudice established by "strong mental mitigation" that was "essentially unrebutted"); *Mitchell v. State*, 595 So.2d 938, 942 (Fla.1992) (affirming trial court's order for a new penalty phase because statutory and nonstatutory mitigation showing brain damage, drug and alcohol abuse, and child abuse was not presented by counsel); *State v. Lara*, 581 So.2d 1288, 1289 (Fla.1991) (prejudice established by evidence of statutory mitigating factors and abusive childhood that was not presented because counsel "virtually ignored" the penalty phase). In *Hildwin v. Dugger*, 654 So.2d 107 (Fla.1995), we reversed for a new penalty phase because trial counsel's investigation was "woefully inadequate" and

failed to discover "an abundance of mitigating evidence which his trial counsel could have presented at sentencing," in addition to the lay witnesses who testified, and which would have established statutory mental mitigation. *Id.* at 109–10.

Thus, mental mitigation that establishes statutory and nonstatutory mitigation can be considered to be a weighty mitigator, and failure to discover and present it, especially where the only other mitigation is insubstantial, can therefore be prejudicial. We do not overlook the fact that this murder was especially heinous, atrocious or cruel or that the robbery aggravator clearly exists. However, Hurst was only nineteen at the time of the murder and had no criminal background. Dr. McClain testified to the existence of Hurst's substantial impairment of capacity to appreciate the criminality of his act, a statutory mitigator. She also testified to the statutory mitigator that Hurst was under extreme duress or domination of another. Mitigation consisting of borderline intelligence, impaired intellectual functioning, possible organic brain damage and fetal alcohol syndrome—all considered strong mitigators—as well as Hurst's educational history, including his special education courses and educational failures, would not have been insignificant in this case. This testimony could have been presented to the jury to augment the "negligible" and "minimal" mitigation noted by this Court on direct appeal. *Hurst*, 819 So.2d at 702.

We also note that both the prosecutor and the trial judge criticized the lack of any mental health expert testimony in the penalty phase of the trial. The prosecutor argued to the jury that although Hurst's mother testified he had the emotional age of ten or eleven:

> [T]here has been no reliable professional expert testimony that any kind of psychological testing has ever been done on him to determine that he is any age emotionally. If he's never had any psychological testing, then I think it's reasonable to infer that there has never been any reason to have him tested psychologically or emotionally.... You haven't heard any testimony from any type of a mental health expert to say that he has any type of mental condition that limits his capacity to understand the criminality of his acts.

Tellingly, the trial court specifically noted the lack of any mental health expert testimony, stating:

> The only evidence offered by the Defendant to establish this factor was the testimony of his mother who claimed that Defendant is ten years old emotionally. There was no testimony from any mental health expert to corroborate this testimony.. There is absolutely no evidence that the Defendant's capacity was impaired.

Thus, it can be seen that failure to present the mental mitigation that was available had an identifiable detrimental effect on the process of weighing the aggravation and mitigation in this case.

As the postconviction court found, after hearing the mental health experts' testimony at the evidentiary hearing, both statutory and nonstatutory mitigation is available for consideration that was not available during the penalty phase of Hurst's trial. There appears to be no countervailing "double-edged" sword to presentation of this mitigation—it did not indicate antisocial personality disorder or another unfavorable psychiatric

condition and was not inconsistent with Hurst's "not guilty" posture. Because this mitigation was not made available for the jury or the trial judge to consider before the death sentence was imposed, our confidence in the imposition of the death penalty in this case is undermined. Accordingly, we must vacate the death sentence in this case and remand for a new penalty phase proceeding.

V. CUMULATIVE ERROR

Hurst contends that the cumulative effect of errors in this case deprived him of a fundamentally fair trial and undermines confidence in the result of the capital proceedings. Where multiple errors are found, even if deemed harmless individually, "the cumulative effect of such errors" may "deny to defendant the fair and impartial trial that is the inalienable right of all litigants." *Brooks v. State*, 918 So.2d 181, 202 (Fla.2005) (quoting *Jackson v. State*, 575 So.2d 181, 189 (Fla.1991)); *see also McDuffie v. State*, 970 So.2d 312, 328 (Fla.2007). Where several errors are identified, the Court "considers the cumulative effect of evidentiary errors and ineffective assistance claims together." *Suggs v. State*, 923 So.2d 419, 441 (Fla.2005). However, where the alleged errors urged for consideration in a cumulative error analysis are individually "either procedurally barred or without merit, the claim of cumulative error also necessarily fails." *Israel v. State*, 985 So.2d 510, 520 (Fla.2008) (quoting *Parker v. State*, 904 So.2d 370, 380 (Fla.2005)); *see also Rogers v. State*, 957 So.2d 538, 555 (Fla.2007); *Wright v. State*, 857 So.2d 861, 871 (Fla.2003); *Downs v. State*, 740 So.2d 506, 509 n. 5 (Fla.1999).

We have concluded that the State should have disclosed certain of Investigator Nesmith's field notes and that the trial court's refusal to perpetuate the testimo-

ny of Willie Griffin was an abuse of discretion. However, as explained above, no prejudice accrued from these errors. Because we also conclude that these guilt phase errors did not deprive Hurst of a fair trial cumulatively, we find no merit to Hurst's cumulative error claim as to the guilt phase in this case. As to the penalty phase, we are vacating Hurst's sentence of death and remanding for a new penalty phase proceeding, thereby obviating the need to discuss cumulative error as to the penalty phase.

VI. CONCLUSION

Based on the foregoing, we affirm the trial court's order denying relief as to the guilt phase claims raised by Hurst. We reverse the trial court's order denying relief as to his penalty phase claim of ineffective assistance of counsel in investigation and presentation of mental mitigation, vacate his sentence of death, and remand for a new penalty phase proceeding before a jury, which may consider available evidence of aggravation and mitigation.

It is so ordered.

QUINCE, C.J., and PARIENTE, LEWIS, CANADY, POLSTON, LABARGA, and PERRY, JJ., concur.

IN THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT
IN AND FOR ESCAMBIA COUNTY, FLORIDA

STATE OF FLORIDA,

vs.

TIMOTHY LEE HURST,
Defendant.

Case No.: 1998 CF 001795 A
Div.: C
[FILED STAMP: 2012 FEB 23 P 5:16]

ORDER DENYING MOTION FOR EVIDENTIARY HEARING FOR DETERMINATION OF MENTAL RETARDATION OF THE DEFENDANT

THIS CAUSE came before the Court upon the Defendant's "Motion to Declare Defendant's Mental Retardation as a Bar to Execution and Request for Hearing." In his motion, the Defendant requests this Court to "order an evidentiary hearing for a determination of mental retardation of Mr. Hurst...." Because the Defendant is seeking proceedings that are outside the scope of the Florida Supreme Court's remand, the Court finds that the Defendant's request for an evidentiary hearing should he denied.

The proceedings are taking place pursuant to an order of the Supreme Court of Florida in Hurst v. State, 18 So. 3d 975 (Fla. 2009). In that appeal, the Defendant sought review of an order of this Court denying his motion filed pursuant to rule 3.851, Florida Rules of

Criminal Procedure. The Florida Supreme Court concluded:

> [W]e affirm the trial court's order denying relief as to the guilt phase claims raised by Hurst. We reverse the trial court's order denying relief as to his penalty phase claim of ineffective assistance of counsel in investigation and presentation of mental mitigation, vacate his sentence of death, and remand for a new penalty phase proceeding before a jury, which may consider available evidence of aggravation and mitigation.
>
> Hurst v. State. 18 So. 3d 975, 1015-16 (Fla. 2009).

As previously noted, this cause was remanded for a new penalty phase proceeding *before a jury*, which may consider available evidence of aggravation and mitigation. The fact that the Florida Supreme Court specifically remanded for a proceeding before a jury is of consequence. As the Florida Supreme Court has instructed:

> We also conclude that summary denial was also proper as to Spencer's claim regarding trial counsel's failure to request that a new jury be impaneled upon remand for resentencing. In Spencer's direct appeal, this Court "vacate [d] his death sentence and remand[ed] this case for reconsideration of the death sentence *by the judge.*" Spencer v. State, 645 So. 2d 377, 385 (Fla. 1994) (emphasis added). After resentencing, the Court explained the procedural history of the case by stating "we remanded the case for reconsideration of the death sentence *by the judge.*" Spencer v. State, 691 So. 2d 1062, 1063

(Fla.1996) (emphasis added). In those instances where we have remanded a case for a new penalty phase proceeding before a new jury, we have stated so in clear language. See, e.g., Brooks v. State, 762 So. 2d 879,905 (Fla.2000); Johnson v. State, 750 So. 2d 22, 28 (Fla.1999); Donaldson v. State, 722 So. 2d 177, 189 (Fla.1998). Thus, trial counsel cannot be faulted for failing to seek proceedings beyond the scope of this Court's remand and the lower court's summary denial was proper.

Spencer v. State, 842 So. 2d 52, 70 (Fla. 2003).

In a different case, the Florida Supreme Court stated:

We remanded this case to the trial court solely for an evidentiary hearing on the issue of whether Arbelaez's trial counsel was ineffective in failing to pursue penalty phase mitigation evidence. After the hearing but before a ruling, Arbelaez attempted to supplement his rule 3.850 motion with arguments based on two recent Supreme Court decisions, Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), and Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). The trial court rejected the supplemental motion as beyond the scope of our remand. We review such decisions under an "abuse of discretion" standard. See Way v. State, 760 So. 2d 903, 916 (Fla. 2000). Although we recognize that it might have been more efficient for the trial court to hear Arbelaez's Ring and Atkins claims during the remand, we cannot say that the trial court abused its discretion in declining

> to hear them. The trial court was justified in adhering strictly to our instructions on remand and dismissing the supplemental motion.
>
> Arbelaez v. State, 898 So. 2d 25, 42-43 (Fla. 2005).

Certainly, there is an appropriate procedure for raising the issue of whether a defendant is mentally retarded so as to prohibit his or her execution.

> In 2001, the Florida Legislature enacted section 921.137, Florida Statutes (2001), which barred the imposition of a death sentence on the mentally retarded and established a method for determining which capital defendants are mentally retarded. See § 921.137, Fla. Stat. (2001). The following year, the United States Supreme Court issued its opinion in Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), holding that execution of mentally retarded offenders constitutes "excessive" punishment under the Eighth Amendment. In response to Atkins and section 921.137, we promulgated Florida Rule of Criminal Procedure 3.203, which specifics the procedure for raising mental retardation as a bar to a death sentence. Pursuant to both section 921.137 and rule 3.203, a defendant must prove mental retardation by demonstrating: (1) significantly subaverage general intellectual functioning; (2) concurrent deficits in adaptive behavior; and (3) manifestation of the condition before age eighteen. See § 921.137(1), Fla. Stat. (2007); Fla. R.Crim. P. 3.203(b).
>
> Nixon v. State, 2 So. 3d 137, 141 (Fla. 2009).

> Section 921.137(1) sets forth the governing legal standard and rule 3.203 outlines the procedural requirements for mental retardation claims.

Id., at 144.

It is clear that rule 3.203 provides for a *pretrial* motion[1] to determine mental retardation as a bar to execution.[2] Rule 3.203(d) provides that "[t]he motion for a determination of mental retardation as a bar to execution shall be filed not later than 90 days prior to trial, or at such time as is ordered by the court." In addition, rule 3.203(f) states that a "claim authorized under this rule is waived if not filed in accord with the time requirements for filing set out in this rule, unless good cause is shown for the failure to comply with the time requirements." Rule 3.203(g) provides that "[i]f, after the evidence presented, the court is of the opinion that the defendant is mentally retarded, the court shall order the case to proceed without the death penalty as an issue." It is clear that a determination of mental retardation is a question for a judge, *not a jury*, to resolve, "We have rejected this argument and held that a defendant 'has no right under Ring and Atkins to a jury

---

[1] "[T]he rule, as adopted, provides for the determination of mental retardation to be made, in most cases, before trial." Amendments to Florida Rules of Criminal Procedure & Florida Rules of Appellate Procedure. 875 So. 2d 563 (Fla. 2004)(Cantero, J., Concurring).

[2] The Court notes that section 921.137, Florida Statutes, provides for such a motion to be filed after the penalty phase, if one is to be held. However, it is well settled that matters of practice and procedure in state courts are solely the province of the Florida Supreme Court and may not be exercised by the legislature. Military Park Fire Control Tax Dist. No. 4 v. DeMarois, 407 So. 2d 1020 (Fla. 4th DCA 1981).

determination of whether he is mentally retarded.'" Kilgore v. State, 55 So. 3d 487, 510-11 (Fla. 2010), reh'g denied (Feb. 17, 2011)(citations omitted).

Thus, the Court will not consider this pretrial question that is beyond the scope of the Florida Supreme Court's remand. In its opinion, the Florida Supreme Court noted:

> When the postconviction motion was filed in 2003, Hurst also alleged a claim under Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), but has not appealed denial of that claim. Atkins held that it is unconstitutional to execute a person who is mentally retarded. Id. at 321, 122 S.Ct. 2242. In this regard, "[b]oth the statute and our rule define mental retardation as 'significantly subaverage general intellectual functioning *existing concurrently with* deficits in adaptive behavior and manifested during the period from conception to age 18.'" Jones v. State, 966 So. 2d 319, 326 (Fla.2007) (quoting § 921.137(1), Fla. Stat. (2005)). See § 921.137(1), Fla. Stat. (2008); Fla. R.Crim. P. 3.203(b) (effective Oct. 1, 2004).
>
> Hurst v. State. 18 So. 3d 975, 1008, n.9 (Fla. 2009)(emphasis retained).

The Court certainly appreciates the possibility that new techniques in evaluating a person's "general intellectual functioning" may have been developed since Mr. Hurst was last evaluated. However, to be "mentally retarded," as noted above, significantly subaverage general intellectual functioning must exist concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18. Pursuant to rule 3.203(b), "adaptive behavior" means "the effec-

tiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community." To be diagnosed as mentally retarded, a defendant must show "significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, and work." Hodges v. State, 55 So. 3d 515, 534 (Fla. 2010), reh'g denied (Feb. 23, 2011), cert. denied, 132 S. Ct. 164 (2011). Testimony regarding such historical facts previously submitted would not be less reliable due to advances in science.

In the Court's order denying post-conviction relief, filed on August 23, 2007, this Court addressed an Atkins claim raised by the Defendant and noted that even the Defendant's own expert, Dr. McClain, concluded that she "would not make a finding of mild mental retardation or mental retardation, specifically because of Defendant's level of adaptive behavior." Attachment 1. The State's expert, Dr. Larson, concluded that the Defendant is not mentally retarded and "concurred in Dr. McClain's finding that Defendant's adaptive behavior was not substantially impaired, and that Defendant's abilities did not demonstrate either mild mental retardation 'or other levels of retardation.'" Id.

In summary, because the Defendant is seeking, very shortly prior to the scheduled penalty phase, to raise an issue that is beyond the scope of the Florida Supreme Court's remand and because this Court has previously determined that the Defendant is not mentally retarded, the motion will be denied. Accordingly, it is:

ORDERED and ADJUDGED that the Defendant's "Motion to Declare Defendant's Mental Retardation as a Bar to Execution and Request for Hearing" is hereby **DENIED.**

DONE and ORDERED in Chambers at Pensacola, Escambia County, Florida this 23rd day of February, 2012,

/s/ Linda L. Nobles
LINDA L. NOBLES
Circuit Judge

LLN/lcw

Copies furnished to:

D. Todd Doss, Esq.
725 Southeast Baya Drive
Suite 102
Lake City, FL 32056
Counsel for Defendant

John Molchan, Assistant State Attorney

ATTACHMENT # 1

IN THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT
IN AND FOR ESCAMBIA COUNTY
STATE OF FLORIDA

STATE OF FLORIDA,
Plaintiff/Respondent.

vs.

TIMOTHY LEE HURST,
Defendant/Petitioner.

Case No.: 1998 CF 001795 A
Div.: C
[FILED STAMP: 2007 AUG 23 P 4:52]

ORDER DENYING DEFENDANT'S MOTION TO VACATE JUDGMENT OF CONVICTION AND SENTENCE

[1] **THIS CAUSE** comes before the Court on Defendant's "Motion to Vacate Judgment of Conviction and Sentence," pursuant to Florida Rule of Criminal Procedure 3.851,[1] filed October 16, 2003; Defendant's "Supplemental Motion to Vacate Judgment of Conviction and Sentence," filed September 30, 2004; Defendant's "Second Supplemental Motion to Vacate Judgment of Conviction and Sentence," filed January 24, 2005; Defendant's "Third Supplemental Motion to Vacate Judgment of Conviction and Sentence," filed May 23, 2005; and Defendant's "Fourth Supplemental Motion to Vacate Judgment of Conviction and Sentence," filed September 29, 2005. After full consideration of the instant motion and supplements, the State's responses and Defendant's replies thereto, evidence adduced at evidentiary hearing, written arguments submitted by Defendant

* * *

[1] According to Defendant's motion, the instant motion is filed pursuant to Florida Rules of Criminal Procedure 3.850 and 3.851. However, because the motion was filed after October 1, 2001, only rule 3.851 is applicable to Defendant's claims for postconviction relief. See Fla. R. Crim. P. 3.851.

[53] decision regarding the necessity of evaluation based upon the case law in existence at the time.[140]

Counsel cannot be held ineffective for following the wishes of his client. See Fotopolous v. State, 838 So. 2d 1122, 1131 (Fla. 2002). The Court finds counsel's testimony credible that Defendant did not wish to be evaluated by a mental health expert, and that counsel adhered to his client's wishes. Additionally, Defendant has failed to demonstrate that, based upon the law at the time of counsel's decision, counsel acted deficiently in failing to engage a mental health expert. Further, when weighing the mental health mitigation testified to by Dr. McClain at evidentiary hearing against the aggravating evidence presented at trial, Defendant has failed to demonstrate that he was prejudiced by counsel's failure to have Defendant evaluated by a mental health expert. See Bell v. State, No. SC02-1765, 32 Fla. L. Weekly S307, 2007 WL 1628143 at *21, (Fla. 2007); see also Hannon v. State, 941 So. 2d 1109, 1137-1138 (Fla. 2006).

V. ATKINS CLAIM

Defendant further claims that, pursuant to the Atkins decision, he is prohibited from being executed because he is mentally retarded. Although Defendant's motion was filed before the Florida Supreme Court enacted Florida Rule of Criminal Procedure 3.203 in response to Atkins, the Court finds that the instant claim is governed by Atkins and rule 3.203.

To establish mental retardation, Defendant must demonstrate all three of the following: 1) significantly subaverage general intellectual functioning; 2) concur-

---

[140] See EHT, Vol. I, pp. 69-70.

rent deficits in adaptive behavior; and 3) manifestation of the condition before age eighteen. See Fla. R. Crim. P. 3.203(b). Defendant has failed to demonstrate that he is mentally retarded. At evidentiary hearing, Dr. McClain [54] (Defendant's expert) and Dr. Larson (the State's expert) both testified that after evaluating Defendant, they had come to the conclusion that Defendant is not mentally retarded.

Dr. McClain found that Defendant had been a below-average student.[141] However, upon further questioning, Dr. McClain conceded that Defendant obtained grades which fell in the range of above-average to failing.[142] Based upon the various tests administered by Dr. McClain, she found that Defendant's overall intellectual functioning was in the borderline range, with an IQ score of 70.[143] Dr. McClain clarified that, in laymen's terms, borderline intellectual functioning is considered a "step above" mental retardation.[144] Dr. McClain testified that Defendant's adaptive behavior, while "somewhat lower as compared with the average person," was not considered "significantly lower," so as to meet the criteria of being mentally retarded.[145] Dr. McClain testified that based upon her findings, she would *not* make a finding of mild mental retardation or mental retardation, specifically because of Defendant's level of adaptive behavior.[146]

---

[141] See EHT, Vol. I, p. 104.

[142] See EHT, Vol. I, pp. 140-144.

[143] See EHT, Vol. I, p. 107.

[144] See EHT, Vol. I, p. 140.

[145] See EHT, Vol. I, pp. 112 & 134.

[146] See EHT, Vol. I, pp. 149-150.

Dr. Larson was also of the opinion that Defendant is not mentally retarded.[147] Dr. Larson testified that he had reviewed Defendant's school records, and was of the opinion that a mentally [55] retarded person would not have been able to attain the grades obtained by Defendant.[148] Dr. Larson determined that Defendant's "full-scale" IQ was 78. Dr. Larson acknowledged that Defendant's IQ demonstrated that he had borderline intellectual functioning, consistent with Dr. McClain's findings.[149] Dr. Larson also confirmed that Defendant's IQ would not meet the statutory requirement of mental retardation.[150] Dr. Larson additionally opined that Defendant's recorded statement given to law enforcement in this case further demonstrates that Defendant is not mentally retarded.[151] Dr. Larson concurred in Dr. McClain's finding that Defendant's adaptive behavior was not substantially impaired, and that Defendant's abilities did not demonstrate either mild mental retardation "or other levels of retardation."[152]

The evidence before the Court conclusively demonstrates that Defendant is not mentally retarded. Defendant has failed to satisfy his burden, and he is not entitled to relief as to this claim.

---

[147] See EHT, Vol. II, p. 216.

[148] See EHT, Vol. II, pp. 204-206.

[149] See EHT, Vol. II, p. 174.

[150] See EHT, Vol. II, p. 174.

[151] See EHT, Vol. II, pp. 206-207.

[152] See EHT, Vol. II, p. 207.

VI. RING CLAIM

Defendant's sixth claim is based on the United States Supreme Court decision of Ring v. Arizona. However, the Supreme Court of Florida has repeatedly and consistently upheld Florida's death penalty scheme in light of Ring. See Owen v. State. 862 So. 2d 687, 703-04 (Fla. 2003); Anderson v. State. 863 So. 2d 169, 189 (Fla. 2003); Duest v. State. 855 So. 2d 33, 48-49 (Fla. 2003); Rivera v. State. 859 So. 2d 495,508 (Fla. 2003); McCoy v. State. 843 So. 2d 396, 409 (Fla. 2003).

* * *

[62] Defendant has failed to demonstrate that he is entitled to relief as to this claim.

IX. CUMULATIVE ERROR

Because the Court has found that Defendant's allegations of Brady and/or Giglio violations, newly discovered evidence, ineffective assistance of counsel during the guilt and penalty phases, and other miscellaneous claims have no merit, a cumulative analysis of Defendant's claims does not entitle Defendant to relief.

CONCLUSION

Defendant has failed to meet his burden of showing prejudicial error in support of his motion. Defendant has failed to demonstrate that any Brady or Giglio violations occurred in the instant case. The Court finds that trial counsel was not ineffective under the standards espoused in Strickland, because his actions fell within the wide range of reasonable professional judgment, and because Defendant has not shown that the result of the trial and sentencing would have likely been different. See Strickland, 466 U.S. at 699, 104 S.

Ct. 2070. Defendant's claims of newly discovered evidence consist mostly of incredible testimony; this observation aside, the "newly discovered evidence" presented by Defendant would not have changed the outcome of the instant case. Defendant's remaining claims are either procedurally barred or without merit.

Accordingly, it is **ORDERED** and **ADJUDGED** that:

1. Defendant's "Motion to Vacate Judgment of Conviction and Sentence," is hereby **DENIED** in its entirety;

2. Defendant has thirty (30) days from the date of this order to file a notice of appeal, should he so choose.

[63] DONE AND ORDERED in Chambers at Pensacola, Escambia County , Florida, this 23rd day of August, 2007.

/s/ Linda L. Nobles
LINDA L. NOBLES
CIRCUIT JUDGE

LLN/mco

Copies to:
√ Timothy Hurst, DC# 124669, Union Correctional Institution, 7819 NW 228th St., Raiford, FL 32026-4000
√ Jeffrey Hazen, Esq., and Harry Brody, Esq., 1804 Miccosukee Commons Dr., Suite 200, Tallahassee, FL 32308
√ Stephen R. White, AAG, Office of the Attorney General, The Capitol, PL-01, Tallahassee, FL 32399
√ John C. Spencer, ASA, c/o Kay Buckner, 190 Governmental Center, Pensacola, FL 32501

IN THE CIRCUIT COURT
IN AND FOR ESCAMBIA COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff.

vs.

TIMOTHY LEE HURST,
Defendant.

CLERK NO.: 1798CC001795A
[FILED STAMP: 2012 MAR -9 P 1:08]

7.11 PENALTY PROCEEDINGS - CAPITAL CASES FINAL INSTRUCTIONS

It is now your duty to advise the court as to the punishment that should be imposed upon the defendant for the crime of First Degree Murder. You must follow the law that will now be given to you and render an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty or whether sufficient mitigating circumstances exist that outweigh any aggravating circumstances found to exist. The definition of aggravating and mitigating circumstances will be given to you in a few moments. As you have been told, the final decision as to which punishment shall be imposed is the responsibility of the judge. In this case, as the trial judge, that responsibility will fall on me. However, the law requires you to render an advisory sentence as to which punishment should be imposed—life imprisonment without the possibility of parole or the death penalty.

Although the recommendation of the jury as to the penalty is advisory in nature and is not binding, the jury recommendation must be given great weight and deference by the Court in determining which punishment to impose.

Your advisory sentence should be based upon the evidence of aggravating and mitigating circumstances that has been presented to you in these proceedings. It is up to you to decide which evidence is reliable. You should use your common sense in deciding which is the best evidence, and which evidence should not be relied upon in considering your verdict. You may find some of the evidence not reliable, or less reliable than other evidence.

You should consider how the witnesses acted, as well as what they said. Some things you should consider are:

1. Did the witness seem to have an opportunity to see and know the things about which the witness testified?
2. Did the witness seem to have an accurate memory?
3. Was the witness honest and straightforward in answering the attorneys' questions?
4. Did the witness have some interest in how the case should be decided?
5. Did the witness' testimony agree with the other testimony and other evidence in the case?
6. Had the witness been offered or received any money, preferred treatment or other benefit in order to get the witness to testify?

7. Had any pressure or threat been used against the witness that affected the truth of the witness' testimony?

8. Did the witness at some other time make a statement that is inconsistent with the testimony he or she gave in court?

9. Was it proved that the witness had been convicted of a felony or a crime involving dishonesty?

10. Was it proved that the general reputation of the witness for telling the truth and being honest was bad?

You may rely upon your own conclusions about a witness. A juror may believe or disbelieve all or any part of the evidence or the testimony of any witness.

Expert witnesses are like other witnesses with one exception—the law permits an expert witness to give an opinion. However, an expert's opinion is only reliable when given on a subject about which you believe that person to be an expert. Like other witnesses, you may believe or disbelieve all or any part of an expert's testimony.

A defendant in a criminal case has a constitutional right not to testify at any stage of the proceedings. You must not draw any inference from the fact that a defendant does not testify.

These are some general rules that apply to your discussion. You must follow these rules in order to return a lawful recommendation:

1. You must follow the law as it is set out in these instructions. If you fail to follow the law, your recommendation will be a miscarriage of jus-

tice. There is no reason for failing to follow the law in this case. All of us are depending upon you to make a wise and legal decision in this matter.

2. Your recommendation must be decided only upon the evidence that you have heard from the testimony of the witnesses, have seen in the form of the exhibits in evidence, and these instructions.

3. Your recommendation must not be based upon the fact that you feel sorry for anyone, or are angry at anyone.

4. Remember, the lawyers are not on trial. Your feelings about them should not influence your recommendation.

5. It is entirely proper for a lawyer to talk to a witness about what testimony the witness would give if called to the courtroom. The witness should not be discredited by talking to a lawyer about his or her testimony.

6. Your recommendation should not be influenced by feelings of prejudice, or by racial or ethnic bias, or by sympathy. Your recommendation must be based on the evidence, and on the law contained in these instructions.

An aggravating circumstance is a standard to guide the jury in making the choice between the alternative recommendations of life imprisonment without the possibility of parole or death. It is a statutorily enumerated circumstance which increases the gravity of a crime or the harm to a victim.

An aggravating circumstance must be proven beyond a reasonable doubt before it may be considered by

you in arriving at your recommendation. In order to consider the death penalty as a possible penalty, you must determine that at least one aggravating circumstance has been proven.

The State has the burden to prove each aggravating circumstance beyond a reasonable doubt. A reasonable doubt is not a mere possible doubt, a speculative, imaginary or forced doubt. Such a doubt must not influence you to disregard an aggravating circumstance if you have an abiding conviction that it exists. On the other hand, if, after carefully considering, comparing, and weighing all the evidence, you do not have an abiding conviction that the aggravating circumstance exists, or, if, having a conviction, it is one which is not stable but one which wavers and vacillates, then the aggravating circumstance has not been proved beyond every reasonable doubt and you must not consider it in rendering an advisory sentence to the court.

It is to the evidence introduced during this proceeding, and to it alone, that you are to look for that proof.

A reasonable doubt as to the existence of an aggravating circumstance may arise from the evidence, conflicts in the evidence, or the lack of evidence. If you have a reasonable doubt as to the existence of an aggravating circumstance, you should find that it does not exist. However, if you have no reasonable doubt, you should find that the aggravating circumstance does exist and give it whatever weight you determine it should receive.

The aggravating circumstances that you may consider are limited to any of the following that you find are established by the evidence:

1. The capital felony was committed while the defendant was engaged in the commission of any robbery.

2. The capital felony was especially heinous, atrocious or cruel.

   "Heinous" means extremely wicked or shockingly evil.

   "Atrocious" means outrageously wicked and vile.

   "Cruel" means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others.

   The kind of crime intended to be included as heinous, atrocious, or cruel is one accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily torturous to the victim.

The State may not rely upon a single aspect of the offense to establish more than one aggravating circumstance. Therefore, if you find that two or more of the aggravating circumstances are proven beyond a reasonable doubt by a single aspect of the offense, you are to consider that as supporting only one aggravating circumstance.

If you find the aggravating circumstances do not justify the death penalty, your advisory sentence should be one of life imprisonment without possibility of parole.

Should you find sufficient aggravating circumstances do exist to justify recommending the imposition of the death penalty, it will then be your duty to deter-

mine whether the mitigating circumstances outweigh the aggravating circumstances that you find to exist.

A mitigating circumstance is not limited to the facts surrounding the crime. It can be anything in the life of the defendant which might indicate that the death penalty is not appropriate for the defendant. In other words, a mitigating circumstance may include any aspect of the defendant's character, background or life or any other circumstance of the offense that reasonably may indicate that the death penalty is not an appropriate sentence in this case.

A mitigating circumstance need not be proved beyond a reasonable doubt by the defendant. A mitigating circumstance need only be proved by the greater weight of the evidence, which means evidence that more likely than not tends to prove the existence of a mitigating circumstance.

If you determine by the greater weight of the evidence that a mitigating circumstance exists, you may consider it established and give that evidence such weight as you determine it should receive in reaching your conclusion as to the sentence to be imposed.

Among the mitigating circumstances you may consider are:

1. The defendant has no significant history of prior criminal activity.
2. The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.
3. The victim was a participant in the defendant s conduct or consented to the act.

4. The defendant was an accomplice in the capital felony committed by another person and his participation-was relatively minor.

5. The defendant acted under extreme duress or under the substantial domination of another person.

6. The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

7. The age of the defendant at the time of the crime.

8. The existence of any other factors in the defendant's character, background or life, or the circumstances of the offense that would mitigate against the imposition of the death penalty.

If one or more aggravating circumstances are established, you should consider all the evidence tending to establish one or more mitigating circumstances and give that evidence such weight as you determine it should receive in reaching your conclusion as to the sentence that should be imposed.

You have heard evidence about the impact of this homicide on the family, friends, community of Cynthia Harrison. This evidence was presented to show the victim's uniqueness as an individual and the resultant loss by Cynthia Harrison's death. However, you may not consider this evidence as an aggravating circumstance. Your recommendation to the court must be based on the aggravating circumstances and the mitigating circumstances upon which you have been instructed.

The sentence that you recommend to the court must be based upon the facts as you find them from the evidence and the law. If, after weighing the aggravating and mitigating circumstances, you determine that at least one aggravating circumstance is found to exist and that the mitigating circumstances do not outweigh the aggravating circumstances, or, in the absence of mitigating factors, that the aggravating factors alone are sufficient, you may recommend that a sentence of death be imposed rather than a sentence of life in prison without the possibility of parole.

Regardless of your findings in this respect, however, you are neither compelled nor required to recommend a sentence of death. If, on the other hand, you determine that no aggravating circumstances are found to exist, or that the mitigating circumstances outweigh the aggravating circumstances, or, in the absence of mitigating factors, that the aggravating factors alone are not sufficient, you must recommend imposition of a sentence of life in prison without the possibility of parole rather than a sentence of death.

The process of weighting aggravating and mitigating factors to determine the proper punishment is not a mechanical process. The law contemplates that different factors may be given different weight or values by different jurors. In your decision-making process, you, and you alone, are to decide what weight is to be given to a particular factor.

In these proceedings it is not necessary that the advisory sentence of the jury be unanimous.

The fact that the jury can recommend a sentence of life imprisonment or death in this case on a single ballot should not influence you to act hastily or without due regard to the gravity of these proceedings. Before you

ballot you should carefully weigh, sift, and consider the evidence, realizing that human life is at stake, and bring your best judgment to bear in reaching your advisory sentence.

If a majority of the jury, seven or more, determine that TIMOTHY LEE HURST should be sentenced to death, your advisory sentence will be:

> A majority of the jury by a vote of _____, to _____ advise and recommend to the court that it impose the death penalty upon TIMOTHY LEE HURST.

On the other hand, if by six or more votes the jury determines that TIMOTHY LEE HURST should not be sentenced to death, your advisory sentence will be:

> The jury advises and recommends to the court that it imposes a sentence of life imprisonment upon TIMOTHY LEE HURST without possibility of parole.

When you have reached an advisory sentence in conformity with these instructions, that form of recommendation should be signed by your foreperson, dated with today's date, and returned to the court. There is no set time for a jury to reach a verdict. Sometimes it only takes a few minutes. Other times it takes hours or even days. It all depends upon the complexity of the case, the issues involved and the makeup of the individual jury.

You should take sufficient time to fairly discuss the evidence and arrive at a well reasoned recommendation.

You will now retire to consider your recommendation as to the penalty to be imposed upon the defendant.

IN THE CIRCUIT COURT
IN AND FOR ESCAMBIA COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff.

vs.

TIMOTHY LEE HURST,
Defendant.

CLERK NUMBER: 1798CC001795A
[FILED STAMP: 2012 MAR -9 P 1:08]

ADVISORY SENTENCE

A majority of the Jury, by a vote of 7 to 5, advise and recommend to the Court that it impose the death penalty upon Timothy Lee Hurst.

/s/ James J. Faxlanger — 3/9/12
FOREPERSON SIGNATURE — DATE

James J. Faxlanger
PRINTED NAME OF FOREPERSON

IN THE CIRCUIT COURT
IN AND FOR ESCAMBIA COUNTY, FLORIDA

STATE OF FLORIDA,

vs.

TIMOTHY HURST,
Defendant

CASE NO: 1998 CF 001795
[FILED STAMP: 2012 SEP 24 A 10:11]

TRANSCRIPT OF APRIL 4, 2012 *SPENCER* HEARING

---

* * *

[2] **PROCEEDINGS**

THE COURT: We are here in State of Florida, Plaintiff, versus Timothy Lee Hurst, Defendant. 1998-CF-1795.

It's my understanding that Mr. Molchan had elbow surgery; and so therefore, Ms. Jensen is in his stead today. And we have Mr. Hurst present being represented by Mr. Doss.

Because the recommendation by the jury was death, we are now conducting a Spencer hearing.

So, counsel?

MR. DOSS: Judge, as far as the Spencer hearing, I don't necessarily have any other witnesses to present, Judge.

A couple of different things that I'd like to address, Your Honor: And one is, is that — and probably the main one — is Your Honor obviously sat through all of the testimony and we had, had the motions by myself and Your Honor's ruling regarding the mental retardation issue, regarding whether we could argue it as a bar to execution or not. What I'm hear to argue today is that it is a bar to execution.

I think that when you look at the trial, when you look at the testimony that we've presented through [3] Dr. Tobb (phonetic) and Dr. Crop (phonetic), coupled with the brain damage testimony provided by Dr. Woo (phonetic), I think when you combine that up with the adaptive functioning witnesses that we were able to present, Judge, that I think it's clearly established that Mr. Hurst is in fact mentally retarded.

I know that Your Honor had relied upon in — when we were addressing this issue before saying that Dr. McClain (phonetic), in her previous testimony, and Dr. Larson (phonetic), in their previous testimony —

THE COURT: Let me stop you for a moment.

(Off-the-record discussion regarding proceedings not related to this Defendant)

THE COURT: Sorry, Mr. Doss.

MR. DOSS: That's fine, Judge.

When we had discussed it before, you had indicated, regarding the adaptive functioning, that you were in fact relying upon that as far as a basis not to have the 3203 hearing.

Regardless of that, I think what we presented was much more than what was presented in post-conviction. What we presented went on un-rebutted, in my opin-

ion. Once — I know Dr. McClarin did testify, but I think during his testimony, although he said that he did not think that Mr. Hurst [4] was not mentally retarded, I think the — the clearer weight of the evidence was otherwise. He wanted to rely on WAIS-III tests. He showed up to give WAIS-IV tests himself.

So I think as far as the — when you look at the testing and when you look at the scores, that the scores are absolutely there, that the adaptive functioning Dr. Crop had testified, that he had utilized the ABAS, the Adaptive Behavior Assessment System, and that the scoring came out where he was definitely in the mentally retarded range. We put on the very witnesses that Dr. Crop had relied upon to go into that Adaptive Behavior Assessment System. Their testimony went unchallenged as to the adaptive functioning of Mr. Hurst. It wasn't as if we just had a couple of family members up. We had principals. We had assistant principals. We had a bible study teacher. We had a very large spectrum of people that had come forward to testify regarding these adaptive functioning deficits that were — that Mr. Hurst has suffered from on a lifelong basis, which is, as Your Honor well knows, one of the prongs whenever we're looking at this, is was the onset before age 18; do we have a score that's two standard deviations below the main; do we have a severe deficit in the adaptive [5] functioning?

When you look at that, I think it definitely places Mr. Hurst in that Atkins class of people. Particularly when you couple it with the brain damage that Dr. Woo testified to and the crippling deficits that, that imposes upon an individual, that not only do you have the whole mental retardation issue, you have the brain damage issue that brings him even more fully into that Atkins class of people that is — results in the bar to execution.

And I think that, that's a unique position and for Your Honor to be in, in the sense that, one, we don't have a lot of these retrials, so I know it's, kind of, uncharted territory in a lot of respects when you couple it in with the Atkins decision, which for us, even though it was in 2004, if I recall correctly, I mean, we're still just now getting to the point where we're dealing with it on some of these retrials. And it's a little bit murky.

But my position is, is, Judge, you can never waive a bar to execution. You can't be procedurally barred on a bar in execution. And by analogy, what I would like it into, Judge, is if we were looking at the Roper versus Simmons case and the bar for people that were under the age of 18, you can't ever — it's a [6] status. You can't ever waive the fact that you were under 18 at the time of the commission of the crime. My position is when you have a bar to execution, you can't waive that. So you can't be procedurally barred in the sense of presenting that kind of evidence, particularly at a resentencing such as this.

And my example, for example, somebody had went to trial and their attorney was found ineffective and that attorney had never presented evidence that the client was under 18 or maybe they just did a poor job of it, they didn't have the birth records and didn't have the things to substantiate that, at a later resentencing, surely that person would not be barred from presenting that kind of evidence to establish that bar because of that person's status. And I think that, that's, in essence, what we have here.

And what I think puts an even bigger twist on it is the US Supreme Court's decision since our trial regarding the ineffective post-conviction counsel and the Martinez versus Ryan case, that they said you didn't neces-

sarily have a right to effective assistance of post-conviction counsel but you can go ahead and plead it even if it would have been procedurally barred in the past in federal habeas. And I think that the realization there is that it's not going to impede [7] somebody from presenting a valid issue, particularly as someone dropped the ball along the way. I think it even more importantly and more — more — in a more dramatic fashion applies here, when we're talking about a status, particularly an intellectual status, and particularly in a scientific field that's going through advancements all the time; and we have a better systems of being able to establish is somebody in fact mentally retarded or not; such as, the WAIS board, the testimony that Dr. Tobb had presented saying this is the most accurate that we have; and I think even from the state doctor we understand that because that's, in fact, what Dr. McClarin showed up to administer to Mr. Hurst.

And when you look at all of those, I think it puts this Court in the position of looking at Mr. Hurst and realizing there is a bar there to execution, and despite the fact that there was a 7-5 death recommendation, that was never argued to the jury. So I don't think that the jury's decision's limiting upon Your Honor in any way. Not that Your Honor is directed to absolutely follow the jury recommendation, although we do know it's great weight to be accorded.

I think in this situation there's less weight to be accorded just because of the interplay of the mental retardation issue that we've been dealing with [8] for months here, that when you look at that, that the jury recommendation on that — because of that particular issue — I think should be afforded even less weight than what would generally be accorded, one, if we had maybe a more — a more straightforward or more tradi-

tional, kind of — that we were here on a first sentencing and that we didn't have the mental retardation issue or status type of bar in play.

Looking at all those factors, Judge, I think that it makes a very powerful case on behalf of Mr. Hurst for Your Honor to enter a life sentence in this case. Here's the other twist, Judge, is there — I don't know — and I'm not a hundred percent sure whether Your Honor is aware of it or not because I didn't see where notice went to you. You know, I had filed the emergency writ before trial starting with the Florida Supreme Court regarding the 3203 issue that I had mentioned and they had denied the motion to stay. The Thursday we were in trial they issued a rule to show cause to the State to answer it.

THE COURT: No, I didn't know that.

MR. DOSS: And then they in fact have answered it, not the state attorney's office, but the attorney general's office. Assistant Attorney General Steve White has in fact answered it and puts us in a weird [9] position in the sense of there is no automatic stay, but until there's final resolution of that, you can't have a final resolution here. And the reason I say that is I didn't think Your Honor was aware of it. I can tell Your Honor I've had discussions with Mr. Hurst, and I think we're going to voluntary dismiss that because to me it makes no sense of we can't un-ring the bell. I mean, I don't know how they can give us the relief that we're asking for unless they say, well, we're going to do it — another sentencing and have a mental retardation hearing before. I think that all that can be dealt with in any subsequent appeal, whether it's — if Your Honor decides to impose death. So that being the case, my intention is to go ahead and voluntarily dismiss that so

that removes that impediment for Your Honor to proceed eventually to a —

THE COURT: Although it would be nice to have a definitive answer as well.

MR. DOSS: That's true, too, Judge.

I think — I think after looking at it, as far as where Mr. Hurst stands and wait it out for him, I think it's best for us to probably voluntarily dismiss that. And regardless of — I know we're not here today for any kind of decision. There's just our opportunity to put things out there for Your Honor to consider.

[10] I had spoke to Ms. Jensen earlier as far as — I think probably our next course of action would be to set a date for us to have a sentencing memorandum, too Your Honor, and set a date for sentencing in the very near future, as according to whatever schedule Your Honor desires.

THE COURT: Well, first of all, I would like to know the answer because I just would like to know whether I was right or wrong. I'm not sure that there are going to be any more of these coming down the pike at least in this division. But I would still like to know whether I was right or wrong. But, clearly, you have to do what is in Mr. Hurst's best interest.

I was going to get to the sentencing memorandum in a moment. But are you done arguing your MR and your twist?

MR. DOSS: Yes, Judge.

THE COURT: I don't know whether Ms. Jensen has anything that she wants to add or not since she is playing —

MS. JENSEN: No. Your Honor, on behalf of Mr. Molchan, he did advise me to advise the Court that the State does not intend to present any additional evidence for the purpose of the Spencer hearing today.

THE COURT: All right. Then we need to [11] discuss sentencing memorandum.

Time frames? I don't know what your calendars are like. I don't know when Mr. Molchan is going to be back.

MS. JENSEN: He will be April 16th. So any time after that date.

THE COURT: I want his due the 17th.

You know, I don't know whether you want to take some time to get with him before I put definitive dates down.

MS. JENSEN: I can do that. I mean, he's accessible by phone. His surgery went good, so he's —

THE COURT: All right. Mr. Doss, knowing that Mr. Molchan is going to be out until the 16th and today's the 4th, so that's almost two weeks still, can you say how long after you receive his memorandum that you would need to be able to respond?

MR. DOSS: That only depends upon whenever his is due because I have a week long post-conviction evidentiary hearing scheduled in Panama City that appears like it's going to go the week of April 30th. So I wouldn't want anything — I mean, knowing that, that's there, depends on when Your Honor — if his is due the 27th or 28th, that's really, you know — I won't be able to do anything during that period of [12] time. If his was due before or after, I can, you know —

THE COURT: Why don't we do this: Instead of setting a date definitive right now, let me first find out from Mr. Molchan. Because, I mean, literally two — I don't know what his elbow — whether he's a left-handed or right-handed and I don't really know whether he's going to be able to — I don't know whether he dictates or types. I just don't know how they do it. Why don't I get with him first, get a realistic time frame. I'll have Jane then email you, and then we'll hear back from you clearly — you truly, if you were a judge, you'd be a circuit judge because you're truly a circuit writer. You are in more places than I've ever seen. So I'm obviously going to give you deference, too, because I know you've got some waiting issues that you're dealing with all over the place. But we'll get them set, and then we'll set a sentencing hearing shortly after those dates.

THE CLERK: Is he to remain in custody at Escambia County Jail until...

MR. DOSS: Judge, we would ask that, Judge.

THE COURT: Let me do this: Because I know we've had him — we've had him here for a fairly lengthy time, I know it is a strain on the jail to do [13] so. Depending upon those dates, if it looks like it's going to be six, eight weeks before we get him sentenced, then I probably will send him back. What I'm going to do is I'll ask the jail because I don't know, quite frankly, whether it's better for them to leave him here or to go to the expense to have him transported. But I'm going to leave that issue to them if it looks like it's going to be a lengthy period of time.

MR. DOSS: Your Honor, I can tell you that I'm not going to need a whole lot of time. Like I said, depending on when it falls, probably ten days.

THE COURT: See, what I'm -- what I'm thinking, though, is I'm thinking that Mr. Molchan is probably not going to be working on it until he gets back. And he gets back the 16th. I'm sure he's going to ask for probably a week to ten days. That would probably put it around the 26th. Then if you need ten days, that's going to put you right at the end of your conviction. I'm sure that, that's going to be something. And you're going to look at me and say maybe May 14th, 12th, something like that, because your start — your start's April 30th, right?

MR. DOSS: That's correct.

THE COURT: So you would be gone the first [14] week of May. So you'd be looking at probably May 10, 12, 14, and then clearly I'm going to need some time to digest all of this. So I'm looking — it's probably going to be the end of May. I mean, I think. It's just the way it's going to fall. Unfortunately, Mr. Molchan's surgery is falling at an inconvenient time, and then your post-conviction is falling at an totally inconvenient time. But we'll just do what we have to do. But if it turns out that the sentencing hearing isn't going to be until the end of May, I probably will send him back should the jail say that, that is what they would like to do.

THE CLERK: So I just say that the Court will contact the jail?

THE COURT: I am going to get with Captain Alford back there. Is it Captain? Okay. And — because he is infinitely familiar — intimately familiar with the jail's concerns. We're trying to decide whether Mr. Hurst stays or goes. I have to get the dates from these folks, but if it is as late as the end of May or towards the end of May before his sentencing, I need to know

from the jail whether they want him to go back or to keep him.

SECURITY OFFICER: Be better if he want back. I can tell you that.

[15] THE COURT: Well, I didn't know the cost of having to ship down and ship back versus the cost of having to maintain. I just didn't know.

SECURITY OFFICER: I think it's pretty much all the same because our warrants division goes to pick him up, and we're making trips back and forth throughout the State. So I don't think the cost is relative.

THE COURT: Well, I think he's probably will get sent back, then, but we'll do the best we can. And I'll get with — matter of fact, you're here. If you want to, if you want to come up to my office, if you — can you — do you think you can — you know, let's go off record because we're, right now, just doing administrative stuff.

(Off-the-record discussion)

THE COURT: Let's go back on. I'm going to back out of the process. I am going to let Ms. Jensen get with Mr. Molchan and Mr. Doss. You get with Ms. Jensen. And you folks call me and tell me when you're going to give me the memorandum. And quite frankly, I don't care if you want to do it in sequence and have the State first and then you, or whether you believe that there's not going to be any surprises and you want to do them at the same time. I don't care. That's up [16] to you. You folks tell me when you want to give me the information; and based upon that, then I'll tell you folks when the sentencing date's going to be.

MS. JENSEN: Sounds good.

THE CLERK: But he's to remain until you call them?

THE COURT: Yes, I would like an answer from you folks before the end of this week.

MS. JENSEN: Oh, yes, ma'am.

MR. DOSS: I'll go downstairs right now, and we might be able to figure it out.

THE COURT: I think Mr. Molchan is going to be the first key and then Mr. Doss after consultation with Mr. Hurst as to whether you want to wait or do it beforehand.

We're done.

(Conclusion of proceedings dated April 4, 2012)

IN THE CIRCUIT COURT
IN AND FOR ESCAMBIA COUNTY, FLORIDA

STATE OF FLORIDA,

vs.

TIMOTHY LEE HURST,
Defendant

Clerk No.: 1798CC001795A
[FILED STAMP: 2012 APR 23 A 11:25]

STATE'S MEMORANDUM OF LAW IN SUPPORT OF THE JURY'S RECOMMENDATION OF DEATH

Pursuant to the Court's instructions on April 4, 2012, the State submits this Memorandum of Law. For the reasons set out below, the State urges the Court follow the jury's recommendation and sentence the defendant to death.

Pursuant to F.S. 921.143(3), the Court must, notwithstanding the recommendation of the jury, independently weigh the aggravating and mitigating circumstances. If the Court imposes a sentence of death, it must find that sufficient aggravating circumstances have been proven beyond a reasonable doubt to justify the imposition of the death penalty, and must set forth in writing the specific facts relied upon to support each applicable aggravating circumstance.

Further, pursuant to Campbell v. State, 571 So.2d 415 (Fla. 1990), the Court must expressly evaluate in its written order each statutory or non-statutory mitigating circumstance proposed by the defendant to deter-

mine whether it is supported by the evidence and whether, in the case of non-statutory factors, it is truly of a mitigating nature. The Court is required to find as a mitigating circumstance, each proposed factor that is mitigating in nature and has been reasonably established by the greater weight of the evidence.

Finally, the Court must weigh the aggravating circumstances against the mitigating circumstances and, in order to facilitate appellate review, must expressly consider in its written order each established mitigating circumstance. Although the relative weight given each mitigating factor is within the province of the Court, a mitigating factor once found cannot be dismissed as having no weight. Campbell at 420.

Prior case law required the Court's written sentencing order imposing death to be prepared prior to oral pronouncement of sentence for filing concurrent with the pronouncement. Armstrong v. State, 642 So.2d 730 (Fla. 1994). However, effective May 30, 1996, Sec. 921.141, was amended to allow a trial court thirty (30) days in which to render its written order sentencing a defendant to death after its oral pronouncement.

In support of a sentence of death, the State urges the Court to find that the following aggravating circumstances have been established beyond a reasonable doubt.

A. The capital felony was committed while the defendant was engaged in the commission of any robbery. F.S. 921.141 (5)(D).

The evidence clearly shows that the bank bag, money, and other items were missing from the safe inside Popeye's Restaurant when the victim's body was found inside the freezer. The

defendant, who was scheduled to work and who was identified at the store was nowhere to be found. The defendant, an employee of the store did not have access or authority to enter the safe. The evidence established that both the store's change fund and previous night deposit were taken by the defendant. The bank bag was recovered along with defendant's size 14 shoes, the victim's black leather coin purse containing her Louisiana driver's license and other items were also recovered at locations where the defendant had instructed a then 15-year-old to place them.

B. The capital felony was especially heinous, atrocious or cruel. F.S. 921.141(5)(H).

According to the testimony of Dr. Berkland, the pathologist, the victim was 4' 8½" tall and weighed a mere 86 pounds. She had more than sixty (60) wounds to her body, which were of the slashing and stabbing type and consistent with having been inflicted with a box cutter that was found at the scene. Further, many of the wounds were superficial poking or sticking wounds. These wounds were not the type which would cause death, but were more compatible with the defendant trying to force the victim to submit to his need to enter the safe. Additionally, the victim was bound and gagged and was clearly not a threat to the defendant. There can be no doubt that this was heinous, atrocious or cruel. Our Supreme Court has consistently upheld this aggravator in cases were the victim is repeatedly stabbed. See, e.g., Finney v. State, 660 So.2d 674, 685 (Fla. 1995), cert. denied, 116 S.Ct. 823, 133 L.Ed. 2d

766 (1996); Pittman v. State 646 So.2d 167, 173 (Fla. 1994), cert. denied, 115 S.Ct. 1982, 131 L.Ed. 2d 870 (1995). Further, the finding of HAC cannot be based only on the method of killing, but must also consider the ordeal of the victim. Copeland v. State, 457 So.2d 1012 (Fla. 1984). The effect upon the victim must be considered in determining the existence of HAC, Clark v. State, 443 So.2d 973 (Fla. 1983), along with a finding that the victim was tortured either physically or emotionally by the killer. Cook v. State, 542 So.2d 964 (Fla. 1989). Thus, the fear and emotional strain may be considered as contributing to the heinous nature of the murder, even where the death is instantaneous. Preston v. State, 607 So.2d 404 (Fla. 1992). Additionally, the Florida Supreme Court in Hall v. State, __So.2d__, 37 F.L.W. 559 (Fla. 2012) recently amplified and characterized the HAC aggravator.

The inescapable conclusion is that the defendant first tortured the victim into granting him access to the safe and money. Then proceeded to mercilessly slice and stab Cynthia Harrison until there was no life left in her diminutive body.

The following mitigating circumstances could be considered by the Court.

A. The defendant acted under the substantial dominion of another person, Lee Lee Smith.

The defendant's own statement to the police refutes that he followed Lee Lee. On page 4, he refers to Lee Lee as "my boy" and goes on to say that after going to Lee Lee's house he and Lee Lee then went to this house and picked up his brother and

went to the pawn shop where he bought two necklaces because his brother and Lee Lee didn't think they were old enough to purchase items from a pawn shop. Lee Lee testified that the defendant came to his house the morning of May 2, 1998 and gave him instructions as to hiding the money, disposing of the shoes and washing the pants. It would appear that Lee Lee follows the defendant. Extreme duress as used in this statutory circumstance refers to external rather than internal provocation, such as imprisonment or use of force or threats by the other person. Toole v. State, 479 So.2d 731 (Fla. 1988). There was no evidence that Lee Lee ever threatened the defendant. This mitigating circumstance has not been reasonably established.

B. The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired.

Even if he is slow mentally, this should not be a mitigating factor under the circumstances. The primary support for this factor comes from the mental testing and PET scan data. While the State concedes that the defendant is not intellectually gifted, there is not sufficient evidence that this limitation substantially impaired his capacity to conform his conduct.

C. The defendant has no prior criminal history.

The State agrees that this factor does exist and should be considered by the Court. Santos v. State, 629 So.2d 838 (Fla. 1994). However, in light of the circumstances of the murder and the conduct of the defendant, this factor is only entitled to some

weight. This lack of criminal history supports the State's position that the defendant's intellect was sufficient to maintain conformity with the law prior to this incident.

D. The defendant assisted his mother and father around the home and took care of and protected his younger siblings.

It is within the Court's discretion whether such family history establishes mitigating circumstances. If the Court should find this to be mitigating, the State urges that it be given very little weight.

E. The age of the defendant.

The defendant was 18-years-old when he committed this murder. There is no per se rule which pinpoints a particular age as an automatic factor in mitigation. Peek v. State, 395 So.2d 492 (Fla. 1980). The propriety of a finding with respect to age depends upon the evidence addressed at trial and at the sentencing hearing, and the Court is not required to find a mitigating circumstance based on youth. Mills v. State, 476 So.2d 172 (Fla. 1985). Age 18 has been found not to be per se mitigating. Cooper v. State, 492 So.2d 1059 (Fla. 1986).

The defendant was legally an adult. He owned his own car and was employed. Under the circumstances, his age should not be considered as a mitigating circumstance.

F. The defendant's intellectual capacity/mental retardation.

The State concedes that the defendant's mental capacity is limited and should be given weight. However, the State does not concede that the defendant is mentally retarded in accordance with the Florida

standard. The Florida standard requires not only a low test score, but additionally concurrently existing deficits in adaptive behavior. The defendant's job, use of a motor vehicle, interaction at stores and pawn shops, the characteristics of this crime, hiding evidence and his statement to law enforcement establish that he does not have those deficits in adaptive behavior and thus does not meet the criteria for mental retardation.

Mitigating circumstances have been defined as "factors that, in fairness or in the totality of the defendant's life or character may be considered as extenuating or reducing the dgree of moral culpability for the crimes committed." Jones v. State, 652 So.2d 346, 351 (Fla. 1995), cert. denied, 116 S.Ct. 202, 133 L.Ed 2d 136 (1995). There is nothing in the way of mitigation that can reduce the defendant's degree of moral culpability for this crime. He knew the victim would be alone; he knew the location of the safe and its contents; he knew the victim would not open the door for a stranger; he was the person whose hand was on the box cutter each time it carved out more life from the victim; a pair of size 14 shoes were thrown away, along with the evidence from the crime scene and two hours later the defendant went to Wal-Mart and bought a brand new pair of size 14 shoes; the defendant's car was seen following behind the victim's car headed in the direction of Popeye's; the defendant was seen getting out of his car at Popeye's and being let inside by the victim; he brought the money and other evidence to Lee Lee Smith and told Lee Lee to dispose of his shoes and to wash his blood-stained pants. Incidently, Lee Lee Smith was charged with Accessory After the Fact to Capital Murder and punished.

In conclusion, the Court should find that the aggravating factors specified above justify the imposition of the death penalty. Further, the Court should find that mitigating circumstances do not outweigh the aggravating circumstances, and the defendant should be sentenced to death.

Respectfully submitted,

/s/ John A. Molchan
JOHN A. MOLCHAN
Assistant State Attorney
First Judicial Circuit
PO Box 12726
Pensacola, FL 32591-2726
Phone: (850) 595-4243
Florida Bar No.: 0747580

IN THE CIRCUIT COURT OF THE
FIRST JUDICIAL CIRCUIT IN AND
FOR ESCAMBIA COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff.

vs.

TIMOTHY HURST,
Defendant.

CASE NO. 98-1795CFA
JUDGE NOBLES
[FILED STAMP: 2012 JUN 28 P 1:18]

SENTENCING MEMORANDUM IN SUPPORT OF LIFE

Mr. Hurst, through undersigned counsel, files this sentencing memorandum in support of this Court rendering a life sentence in the above-styled cause and states:

Regardless of a jury's recommendation, § 921.143(3), Fla. Stat. requires this Court to independently weigh the aggravating and mitigating circumstances. Mr. Hurst argues that a proper consideration of the required sentencing factors obliges this Court to enter a life sentence in Mr. Hurst's case. As the Court is well-aware, a life sentence in this case is without the possibility of parole. Mr. Hurst has now been incarcerated for approximately fourteen years with the vast majority of time spent on death row. Mr. Hurst was first locked up when he was nineteen years old and a life sentence would means he will never get out of prison.

Assuming an average life expectancy, Mr. Hurst can expect over sixty years in prison if this Court orders a life sentence in this case. Regardless of this Court's decision as to a life sentence or a death sentence, Mr. Hurst will spend every day for the rest of his life in prison.

The mitigating circumstances important in Mr. Hurst's case are:

1. Mr. Hurst has no significant history of prior criminal activity;

   A. Testimony revealed Mr. Hurst was never in trouble prior to this case.

2. Mr. Hurst was an accomplice in the capital felony and his participation was relatively minor

3. His ability to conform his conduct to law was substantially impaired due to his low mental functioning;

   A. mental retardation;

   B. brain damage;

   C. Fetal alcohol syndrome;

4. Mr. Hurst was under the influence of extreme mental or emotional disturbance.

5. His young age, particularly his young mental age;

   A. Timothy Hurst acted like a ten or twelve year-old according to the principals who saw and dealt with him everyday. They saw thousands of kids and equated his maturity to that of a ten to twelve year old.

6. The law also allows Mr. Hurst to present and you to find mitigating any other factors in Mr. Hurst background, character or life that tend to mitigate against giving him a sentence of death.

The ultimate question is can this Court hold Tim Hurst – mentally retarded, brain damaged with fetal alcohol syndrome – by all accounts a follower with no prior criminal history accountable to the point of death by execution? The answer is a resounding no. Instead this Court should render a sentence of life in prison without the opportunity to even be considered for parole.

The mitigating factors directing this Court to a life sentence will be dealt with one by one. The first, the weightiest, and the most obvious mitigating factor is that Mr. Hurst is clearly mentally retarded. This fact went essentially un-rebutted during the penalty phase proceedings.

Testimony revealed that Mr. Hurst has been evaluated and tested by psychologists, Dr. Harry Krop and Dr. Gordon Taub. Dr. Krop tested Mr. Hurst's IQ utilizing the approved WAIS-IV testing instrument. The result was a full scale score of 69, which represents a performance of two or more standard deviations below the mean testing score for the WAIS-IV. This testing was never seriously in dispute.

Dr. Taub thoroughly explained why the WAIS-IV was a technological and theoretical advancement over the WAIS-III. The WAIS-IV was proven to be the most current and accurate IQ test for a determination of mental retardation. This is the most up to date edition of the Weschler Intelligence Scale, revised in 2008. Research indicates that the WAIS-IV, with its new

configuration of four index scores rather than just a verbal and performance score, is a more appropriate and better test than previous editions. The WAIS-IV is considered the most accurate assessment of intellectual functioning with more reliable and valid scores as it includes measures of verbal comprehension, perceptual reasoning, working memory and processing speed.

The score of 69 was undisputed. The only issue, albeit woefully weak, raised regarding the IQ scores was that the State's expert, Dr. McClaren, testified that the WAIS-III score of 78 should be used. This testimony was without ever testifying to any indication whatsoever that the testing administered by Dr. Krop was deficient in any manner whatsoever or that the score of 69 was invalid or providing any coherent testimony why the WAIS-III was somehow superior to the WAIS-IV. Perhaps most telling was that Dr. McClaren testified that he showed up at the jail to evaluate Mr. Hurst and administered a WAIS-IV The result was never admitted into evidence or testified to because the practice effect rendered the result invalid. The important fact, however, is that Dr. McClaren's actions clearly reveal that he also truly believed that the WAIS-IV was the most accurate test to administer or he would have administered a WAIS-III, he did not.

Simply stated, Dr. Krop properly administered the test, this was confirmed by Dr. Taub and never disputed by Dr. McClaren. Each doctor confirmed that this score was two standard deviations below the mean and met the cutoff for mental retardation.

In effort to corroborate the accuracy of the IQ score, Dr. Taub administered achievement testing. These achievement tests confirmed what was found on the IQ test and that is that Mr. Hurst suffers from sig-

nificant subaverage intellectual functioning, thus meeting the IQ threshold for mental retardation. The achievement testing administered by Dr. Taub went unchallenged and unrebutted. Mr. Hurst has clearly established that his IQ score of 69 meets the requirement of being two standard deviations below the mean.

Dr. Krop and Dr. Taub also reviewed educational records, correctional records, prior testing results, prior psychological evaluations, case related documents, and investigative summaries of witness interviews and determined that Mr. Hurst's adaptive functioning is deficient in meeting the standards of personal independence and social responsibility expected of his age, cultural group, and community with it beginning prior to his being 18 years of age.

Dr. Krop testified he used the Adaptive Behavior Assessment System or ABAS to assess Mr. Hurst adaptive functioning and that Tim's score was reflective of someone with adaptive functioning skills in the mentally retarded range. The ABAS is generally accepted in the psychological community as a valid measure of someone's adaptive functioning skills. Dr. Krop and Dr. Taub testified that the test was valid and properly administered to Mr. Hurst. Although Dr. McClaren testified that the ABAS was invalid, he was completely unable to cite to any authority whatsoever to support his view. Mistakenly, Dr. McClaren stated that it was not done with input of people who were living with him at the time. This is simply not so, he saw the family members who lived with him come in and testify to his problems in caring for himself. Dr. Krop utilized these same people to complete the ABAs and the questions surrounding the ABAS.

Even without the ABAS, mental retardation has been established. Substantial testimony was provided regarding Tim Hurst's ability to function and was unrebutted. Testimony established that Mr. Hurst could not could cook for himself, follow directions on a box, find his way on a map or a bus, wash clothes, and maintain proper hygiene. These questions were asked to establish his adaptive functioning skills, not to argue something insulting such as he cannot wash his clothes so don't kill him. Under any standard, it is painfully obvious that Mr. Hurst has had a continuous and pervasive inability to care for himself and does not posess the adaptive functioning skills necessary to meet the standards of personal independence and social responsibility expected of his age, cultural group, and community

The testimony of the family demonstrated the lack of Tim Hurst's adaptive functioning skills. Bertha Bradley poured her heart out and admitted drinking when she was a fifteen year old pregnant with Tim. Not just drinking some, but until she got drunk everyday. The result was that it took a tragic toll on Tim. Mrs. Bradley admitted that the reason Tim did not receive special education classes was because she told the school "No" when they asked to put Tim in them. Family members testified that Tim could not cook for himself, clean up after himself, could not find his way without help, could not set appointments and get there on time without help. These facts were established through his stepfather, Tim Bradley, his sister, Tina Hurst, and his brother, Jermaine Bradley. This testimony was never contradicted or disputed, so clearly the adaptive functioning prong of mental retardation was established.

Mental retardation is a bar to execution and it should bar the execution of Mr. Hurst. This Court has previously ruled that it believes that the issue of mental retardation as a bar to execution has already been decided by the Court adversely to Mr. Hurst and is now the law of the case. Mr. Hurst continues to dispute that ruling and will however, without waiving any prior objections, contend that mental retardation is now to be considered as mitigation of the most weighty kind.

Mr. Hurst produced testimony about his cognitive deficits, his brain damage, his brain function, and the PET Scans and evidence to prove it. Initially, Dr. Krop found evidence of brain damage with his neuropsychological testing and he made a referral to conduct further more sensitive testing. As a result, the defense hired Dr. Wu, Director of the UC-Irvine Brain Imaging Center.

Dr. Wu conducted brain scans that revealed severe damage was present in Mr. Hurst's brain. The State never rebutted this testimony and admitted the damage exists in its closing. Dr. Wu testified and showed photos of Tim's brain – the Court saw the picture and there is no disputing that Mr. Hurst brain is different from the normal brain shown side by side with Mr. Hurst's brain.

Dr. Wu explained the damage he saw in Tim's brain. Frontal and temporal lobe damage was clearly present. Dr. Wu explained the frontal lobe damage directly relates to a person being impulsive, lacking judgment, being immature, exhibiting inappropriate risk-taking, breaking rules, and generally lacking an ability to modify and inhibit behavior appropriately.

Importantly, the brain damage fit the pattern of damage associated with fetal alcohol syndrome. Bertha

Bradley's testimony corroborates this evidence. During her testimony Bertha Bradley tearfully and dramatically recounted how she was a teenage mom that got pregnant with Tim Hurst at 15 years of age. Tragically, she drank everyday when she was pregnant with Tim. She drank until she got drunk, not just a little, not every once in a while, but every day until she was drunk. Evidence of fetal alcohol syndrome is thus no surprise. Brain damage is therefore no surprise.

To render a sentence of death in the face of such substantial evidence of mental retardation, brain damage, and fetal alcohol syndrome would be an unconstitutionally excessive punishment; therefore, this evidence, particularly that of mental retardation, should be given maximum weight. The Eighth Amendment of the Constitution is a prohibition against "excessive punishments" of any kind. Atkins, at 2246. The Eighth Amendment requires a meaningful basis for distinguishing "between those individuals for whom death is an appropriate sanction and those for whom it is not." Parker v. Dugger, 498 U.S. 308, 321 (1991). A sentence of death for a severely mentally limited individual is inconsistent with either of the "two principal social purposes [of punishment]: retribution and deterrence of capital crimes by prospective offenders." Thompson v. Oklahoma, 487 U.S. 815, 836 (1988) (internal quotations an citations omitted).

Even though, this Court has stated it will not consider Mr. Hurst's mental retardation as a bar to execution, the weight to be given this most weighty and substantial mitigation is illustrated in the reasoning of Atkins, particularly as to the twin goals of retribution and deterrence as the goal and function of a just sentence. With respect to retribution, the Atkins Court found that "the severity of the appropriate punishment nec-

essarily depends on the culpability of the offender" and concluded that the legislative trend against imposition of the death penalty on those suffering mental retardation means that society finds the mentally retarded less culpable. See Atkins at 2250. Therefore, imposition of the death penalty on a group that is considered categorically less culpable, like the mentally retarded, is unconstitutional. Here, by virtue of the mental retardation Mr. Hurst is afflicted with, he should be considered less culpable than someone not suffering from mental retardation.

As to deterrence, the Atkins Court found that as a result of the limitations on the ability of a person with mental retardation to reason and control himself, the death penalty would have no deterrent effect on his actions. Id., at 2251. Specifically, the Court found that a mentally retarded individual's "diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses" makes it less likely that he will conform her conduct to avoid the possibility of execution. Id. Nor can removing persons with mental retardation from the universe of those who are subject to execution possibly reduce any deterrent effect that the death penalty may have on the rest of the population. See Ford v. Wainwright, 477 U.S. 399 (1986)("[I]t provides no example to others and thus contributes nothing to whatever deterrence value is intended to be served by capital punishment."). The Supreme Court's stated recognition that a diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses is critical in determining whether someone is eligible for the death penalty directly translates into Mr. Hurst's case. Regardless of whether this Court finds the categorical bar to execution applicable to Mr. Hurst, the

evidence surrounding his intellectual disability establishes that he should be held less culpable because of his limited ability to understand and process information, learn from experience, engage in logical reasoning, and to control his impulses.

Given his mental impairments and deficiencies, Mr. Hurst should be excluded and protected from execution because the death penalty would be an unconstitutionally excessive punishment for Mr. Hurst for all the reasons delineated in Atkins. First, with respect to retribution, imposing the death penalty on Mr. Hurst is contrary to evolving standards of decency because those who are severely mentally limited are categorically less culpable. Second, because his mental retardation and/or severe brain damage and severe mental limitations have left Mr. Hurst with a diminished ability to process information, to learn from experience, to engage in logical reasoning, and particularly to control his impulses, imposition of the death penalty could not possibly have a deterrent effect on his actions. In addition, Mr. Hurst's severe mental deficiencies result in his being incapable of independent thought, and highly prone to fall under the influence of others.

Even if it is determined that Mr. Hurst does not fall within the technical definition of mental retardation, Mr. Hurst suffers from an equivalent and equally paralyzing affliction that must be entitled to the same protections under Atkins and the Eighth Amendment. Mental health experts who have examined Mr. Hurst have concluded that he suffers with severe brain damage and substantial mental limitations. Given these substantial mental impairments, executing Mr. Hurst would constitute the needless imposition of pain and suffering in violation of the Eighth amendment of the Constitution of the United States.

Another mitigating factor is the fact that Mr. Hurst was an accomplice and his role in the murder of Cynthia Harrison was relatively minor. Was Tim Hurst a major or minor player in the murder of Cynthia Harrison? The State never was able to produce evidence that Tim Hurst was inside the Popeye's. Others had opportunity to be personally inside Popeye's doing the actual killing. Regardless of whether Tim Hurst was convicted in the guilt phase, the question in the penalty phase becomes was he the actual killer or a principal that was involved, but was not the one inside of Popeye's. This cuts two ways — for the mitigator and takes away from the weight to give the HAC aggravator. The HAC aggravator is not entitled to great weight unless Tim Hurst was the actual killer and not an accessory or principal. Where is the proof that Tim Hurst was more than a participant and guilty as a principal and was the actual perpetrator? As it relates to HAC, this is important because if Tim Hurst is not the one in the Popeye's — then the heinousness of the crime should not be weighed against him.

A summary of the evidence in this penalty phase reveals that on Saturday, May 2, 1998, Tim Hurst woke up around 7:45 a.m. and his mother and dad were both home. Tim left the house and went to Andre Cary's house to use the phone. Once there, Tim saw Andre Cary and Gary's father. There was no testimony of blood on Tim. The pictures of the crime scene reveal an incredibly bloody scene. How could anyone in this time frame show up at these places and not be bloody? The M.E. testified to arterial spurting and blood everywhere — how could someone who was the actual perpetrator inside and not an accomplice not be covered in blood? How could their pants not be covered in blood? Their shirt not be covered in blood? Their steering

wheel cover that is in evidence — not have blood on it? Their brake pedal in evidence not have blood on it?

No blood from this bloody scene in Mr. Hurst's car? If Mr. Hurst was not simply an accomplice how could a mentally retarded brain-damaged individual inflict the damage revealed in the crime scene photos and get in and out of the Popeye's in the window Dr. Berkland spoke of from 7:55 a.m. to 8:05 a.m.?

After leaving Andre Gary's, Tim went to "Junior Food Store" which was in his neighborhood. Then he went to Aldwin Dee's house to use the phone. The statement played by the State revealed that Tim said he used the phone to call Lee-Lee and he didn't answer the phone. Aldwin Dees simply stated that he gave Tim the phone, Tim used it and he left.

Tim then stated that once at Lee-Lee's house, he knocked on the door for awhile until Lee-Lee answered the door. Subsequently, he and Lee-Lee went back to Tim's house. At Tim's house were Bertha and Timothy Bradley, Jermaine Bradley, Dequan Bradley, and Jermaine's friend Marcus. Jermaine and Marcus were playing video games.

A little later Tim, Lee-Lee, Jermaine and Marcus went to Wal-Mart to buy some tennis shoes. Afterwards, the four went to the pawnshop across the street from the Wal-Mart. Tim bought necklaces for Jermaine and Marcus with the money they gave Tim to buy them. Tim saw 3 rings he liked, but didn't have money for them. The four then returned to Tim's house. Jermaine and Marcus stayed at the house, while Tim and Lee-Lee went back to the pawn shop. At the pawn shop, Tim bought the 3 rings he had seen earlier.

Tim and Lee-Lee then went to Escambia Arms to Tim's cousin's house. At the house were Lola Hurst, and Patty Hurst. Tim needed help with his car and stayed there waiting for his Uncle Jesse. While he was waiting, Tim's mom called explaining that the police wanted to question Tim about a murder. Tim and Lee-Lee immediately returned to Tim's house.

Interestingly, Tim's statement the State played is essentially corroborated by each and every witness that the defense presented at the penalty phase. Interestingly, they were never impeached with inconsistent statements, nor did they have trouble remembering. This is in stark contrast to Carl Hess who wants us the jury and the Court to believe his memory is better today than it was 14 years ago in 1998.

Carl Hess identified Tim Hurst as supposedly being at the Popeye's that tragic morning, but his testimony and statements are unworthy of belief. Mr. Hess lied time and time again. He lied about being an assistant manager. He also lied about being a manager trainee because he flunked out of that program. These lies should not be discounted because the basis for his identification of Mr. Hurst was that he supposedly interviewed Tim Hurst. Mr. Hess admitted from the stand he had no authority to interview Tim Hurst. This demonstrates that he originally lied about whether he interviewed Tim Hurst and continues to misrepresent this fact to this day.

Mr. Hess' testimony differs from Mr. Kladitis in several key respects further demonstrating his lack of credibility. Carl Hess never saw or testified regarding the other young black men that pulled up in the parking lot while Mr. Kladitis was there, that were within 50

feet of the Popeye's with their music blaring so loud that Mr. Kladitis had to move to another location.

Mr. Hess never acknowledged seeing Anthony Brown arrive for work at 8:05 a.m. or that Mr. Brown was outside the Popeye's for a couple of hours with the truck driver before Tonya Crenshaw arrived and opened the store. All of this bears on Carl Hess' credibility as to whether he really saw hat he says he saw.

Furthermore, Carl Hess also acknowledged that he did not speak to law enforcement until a couple of days later — plenty of time to see the facts of Mr. Hurst arrest in the paper. All of this bears on the credibility of Mr. Hess, particularly since he is the only one that places Mr. Hurst as being the person actually in the store. Mr. Hess shocking lack of credibility provides plenty of of reason to doubt whether the HAC aggravator applies to Timothy Hurst and fails to refute the fact that Mr. Hurst was a minor participant in the murder of Cynthia Harrison.

Lee-Lee Smith likewise is unworthy of credibility. Not only was impeached with inconsistent statements that he had made at several points throughout this case — the other witnesses testimony refutes his statements. The defense presented Patrick Wallace and Andre Cary as witnesses. Through their testimony not only did they establish that Tim Hurst came by their home to use the phone — and corroborate Tim's statement — they contradicted Lee-Lee Smith's statements that they supposedly got money from the Popeye's robbery. The State never impeached that testimony provided by either Wallace and Cary.

Lee-Lee Smith is also contradicted by the physical evidence the State presented by the State. The shoes in State's Ex. 37 that reportedly have blood on them

and supposedly belong to Tim Hurst do not have any blood on the inside. The socks that are in evidence have Ms. Harrison's DNA on them and are very bloody. If Tim was the one of those involved that was inside of Popeye's and those were his socks there would be blood transferred to the inside of those shoes as well. The Stale has not produced any evidence demonstrating that was the case. The reason for this failure is simply because Tim Hurst was not the one of the perpetrators inside the Popeye's and therefore not deserving of having the HAC aggravator applied against him and is indicative of the fact he was a minor participant.

The execution of Timothy Hurst, a brain damaged, mentally impaired individual, would constitute cruel and unusual punishment under the constitutions of the State of Florida and the United States.

In addition to suffering from a low IQ and brain damage, Timothy Hurst has a mental and emotional age of less than eighteen years, which renders the application of the death penalty in his case cruel and unusual. His execution would therefore offend the evolving standards of decency of a civilized society. See Trop v. Dulles, 356 U.S. 86 (1958), would serve no legitimate penological goal, See Gregg v. Georgia, 428 U.S. 153, 183 (1976), and would violate the Eighth and Fourteenth Amendments to the United States Constitution. See Roper v. Simmons, 543 U.S. 551 (2005). As the Supreme Court held in Simmons,

> Three general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders. First, . . . "[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than

> in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions." * * * The second area of difference is that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure. This is explained in part by the prevailing circumstance that juveniles have less control, or less experience with control, over their own environment.* * * The third broad difference is that the character of a juvenile is not as well formed as that of an adult.* * * These differences render suspect any conclusion that a juvenile falls among the worst offenders.* * * **From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed.**

Simmons at 569-570. (citations omitted; emphasis added).

Mr. Hurst was over 18 years old chronologically, **but not mentally and emotionally,** when the homicide in the above-styled cause occurred. The aforementioned abuse, brain damage, and life history resulted in Mr. Hurst operating at a mental and emotional age significantly below his chronological age at the time of the homicide. Expert psychological testimony established that Mr. Hurst fell within the three general differences the U.S. Supreme Court outlined between juveniles and adults: (1) "[A] lack of maturity and an underdeveloped sense of responsibility; (2) "more vulnerab[ility] or susceptib[ility] to negative influences and outside pressures, including peer pressure; and (3) a character

which was not as well formed as that of an adult, and was more transitory and less fixed. See Simmons at 569-570.

In this case, mental and emotional age standing alone would warrant Eighth Amendment relief. "There is no dispute that a defendant's youth is a relevant mitigating circumstance that must be within the effective reach of a capital sentencing jury if a death sentence is to meet the requirements of Lockett and Eddings." Johnson v. Texas, 113 S. Ct. 2658, 2668 (1993) (citations omitted). The kinds of characteristics attributed to youthful offenders, "a lack of maturity and an underdeveloped sense of responsibility" Id. at 2668-2669, are precisely those characteristics attributable to Mr. Hurst. And it is these very same traits that "often result in impetuous and ill-considered actions and decisions." Id. at 2669.

Capital punishment should not be imposed where a defendant lacks the requisite "highly culpable mental state." Tison, 107 S. Ct. at 1684. Mr. Hurst lacked such a mental state. The background of the defendant reflects "factors which may call for a less severe penalty," Lockett v. Ohio, 438 U.S. 586, 605 (1978). An individual with significant brain damage, such as Mr. Hurst, is the very opposite of the kind of offender whose "highly culpable mental state" has been held to warrant imposition of the death penalty, particularly when coupled with the lack of proof that he was the actual killer of Cynthia Harrison. Simmons & Tison.

The Eighth Amendment prohibits "all punishments which by their excessive length or severity are greatly disproportionate to the offenses charged." Weems v. United States, 217 U.S. 349, 371 (1910) (citation omitted). In furtherance of this principle, the Supreme

Court's Eighth Amendment decisions have made clear that "a criminal sentence must relate directly to the personal culpability of the criminal offender." Tison v. Arizona, 107 U.S. 1676, 1685 (1987). These decisions have also considered "a defendant's intention — and therefore his moral guilt — to be critical to the degree of criminal culpability." Enmund v. Florida, 458 U.S. 782, 800 (1982); accord Tison, 107 S. Ct. at 1687("Deeply ingrained in our legal tradition is the idea that the more purposeful is the criminal conduct, the more serious is the offense, and therefore, the more severely it ought to be punished").

Because capital punishment is our society's ultimate sanction, "unique in its severity and irrevocability," Gregg, 428 U.S. at 187, it may be imposed only when a defendant is found to have "a highly culpable mental state." Tison, 107 S. Ct. at 1684; see also id. at 1687 ("A critical facet of the individualized determination of culpability required in a capital case is the mental state with which the defendant commits the crime"); Godfrey v. Georgia, 446 U.S. 420, 443 (holding capital punishment is inappropriate unless the crime "reflected a consciousness materially more depraved than that of any person guilty of murder").

Because Eighth Amendment proportionality principles forbid the imposition of capital punishment where a defendant lacks the requisite "highly culpable mental state," the Constitution requires an individualized inquiry into the defendant's background and character combined with the circumstances of the offense to determine whether there exist "factors which may call for a less severe penalty." Lockett v. Ohio, 438 U.S. 586, 605 (1978). As Justice O'Connor explained:

> *[E]vidence about the defendant's background* and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.

California v. Brown, 107 S. Ct. 837, 841 (1987) (O'Connor, J., concurring)(emphasis added).

Generally, the proportionality required by the Eighth Amendment has been understood to require individualized, case-by-case assessment of the factors that may diminish culpability. See Eddings; Lockett. The Supreme Court has, however, made several categorical Eighth Amendment judgments about situations in which culpability is automatically insufficient to justify imposition of the death penalty. Some of these judgments have turned on finding categories of criminal acts insufficiently blameworthy to justify a death sentence. See, e.g., Coker v. Georgia, 433 U.S. 584 (1977)(rape); Eberheart v. Georgia, 433 U.S. 917 (1977)(aimed robbery). In other instances the judgment has turned on the level of the defendant's mental state as it relates to the crime: Tison and Enmund, for example, make clear that a defendant may not be sentenced to death unless he has at least been shown to have "a reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death." Tison, 107 S. Ct. at 1688. Further, judgments have turned on the defendant's mental capacity. See Ford v. Wainwright, 106 S. Ct. 2595 (1987)(execution of the insane violates the Eighth Amendment).

When one considers Mr. Hurst's mental capacity and level of functioning, there is no sustainable rationale for imposing the death penalty upon him and not upon the class of individuals outlined in Simmons.

WHEREFORE for the foregoing reasons Mr Hurst request this Court to render a life sentence in the above-styled cause.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail and electronic transmission to John Molchan, Office of the State Attorney, 190 Governmental Center, Pensacola, Florida 32501 and the original by U.S. Mail to the Clerk of Court on this 25th day of June 2012.

D. Todd Doss
Attorney for Defendant
725 Southeast Baya Drive
Suite 102
Lake City, FL 32056
Telephone: (386) 755-9119
Facsimile: (386) 755-3181

/s/ D. Todd. Doss

D. Todd Doss
Florida Bar Number:
0910384

IN THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT
IN AND FOR ESCAMBIA COUNTY, FLORIDA

STATE OF FLORIDA,

vs.

TIMOTHY LEE HURST,
Defendant.

Case No.: 1998 CF 001795A
Div.: C
[FILED STAMP: 2012 AUG 16 [illegible time]]

SENTENCING ORDER

On March 23, 2000, Defendant was found guilty of one count of first degree murder. On April 26, 2000, the Court imposed a sentence of death. Subsequently, the Supreme Court of Florida affirmed Defendant's conviction and sentence. Following postconviction proceedings, the Court entered an order denying Defendant's rule 3.851 motion. On October 8, 2009, the Supreme Court of Florida reversed in part the Court's order and remanded the case for a new penalty phase. From March 5-9, 2012, new penalty phase proceedings were conducted. On March 9, 2012, the jury rendered an advisory sentence of death by a vote of 7 to 5. On April 4, 2012, a Spencer[1] hearing was convened. Although neither party offered additional evidence at the hearing, the

[1] Spencer v. State, 615 So. 2d 688 (Fla. 1993).

State and Defendant presented sentencing memoranda for the Court's consideration in imposing sentence.

Pursuant to §921.141(3), Florida Statutes, the Court must, notwithstanding the recommendation of the jury, independently weigh the aggravating and mitigating circumstances. If the Court finds that a sentence of death is appropriate, it must find that sufficient aggravating circumstances have been proven beyond a reasonable doubt to justify the imposition of the death penalty. In its written order, the Court must set forth the specific facts relied upon to support each applicable aggravating circumstance. Additionally, the Court must expressly evaluate each statutory or non-statutory mitigating circumstance proposed by Defendant to determine whether it is supported by the evidence and whether, in the case of non-statutory factors, is truly of a mitigating nature. See Campbell v. State, 571 So. 2d 415, 419-420 (Fla. 1990). The Court is required to find as a mitigating circumstance each proposed factor that is mitigating in nature, and which has been reasonably established by the greater weight of the evidence. Finally, the Court must weigh the aggravating circumstances against the mitigating circumstances. Id.

The Court will not reiterate all of the facts of the case for the purposes of this order. However, to provide appropriate context, the underlying facts of the case were summarized by the Supreme Court of Florida as follows:

> On the morning of May 2, 1998, a murder .. occurred at a Popeye's Fried Chicken restaurant in Escambia County, Florida, where Hurst was employed. Hurst and the victim, assistant manager Cynthia Lee Harrison, were sched-

> uled to work at 8 a.m. on the day of the murder ... On the morning of the murder, a Popeye's delivery truck was making the rounds at Popeye's restaurants in the area. Janet Pugh, who worked at another Popeye's, testified she telephoned Harrison at 7:55 a.m. to tell her that the delivery truck had just left and Harrison should expect the truck soon. Pugh spoke to the victim for four to five minutes and did not detect that there was anything wrong or hear anyone in the background. Pugh was certain of the time because she looked at the clock while on the phone. Popeye's was scheduled to open at 10:30 a.m. but Harrison and Hurst were the only employees scheduled to work at 8 a.m. However, at some point before opening, two other Popeye's employees arrived, in addition to the driver of the supply truck. None of them saw Hurst or his car. At 10:30 a.m., another Popeye's assistant manager, Tonya Crenshaw, arrived and found the two Popeye's employees and the truck driver waiting outside the locked restaurant. When Crenshaw unlocked the door, and she and the delivery driver entered, they discovered that the safe was unlocked and open, and the previous day's receipts, as well as $375 in small bills and change, were missing. The driver discovered the victim's dead body inside the freezer.

Hurst v. State, 819 So. 2d 689, 692-93 (Fla. 2002).

The Court has carefully considered the evidence, the arguments of counsel, and the relevant legal authority, and makes the following conclusions as to the aggravating and mitigating circumstances, and as to the ultimate penalty to be imposed.

AGGRAVATING CIRCUMSTANCES

The capital felony was especially heinous, atrocious, or cruel.

Dr. Michael Berkland, the deputy medical examiner at the time of the murder, testified that Ms. Harrison weighed 86 pounds and was 4 feet, 8½ inches tall at the time of her death. She had been bound and gagged with electrical tape and had more than sixty (60) wounds to her body. The wounds were consistent with having been inflicted with a box cutter. The Supreme Court of Florida has repeatedly upheld this aggravating circumstance in cases in which a victim was stabbed numerous times. See, e.g. Reynolds v. State, 934 So. 2d 1128 (Fla. 2006); Mahn v. State, 714 So. 2d 391 (Fla. 1998); Rolling v. State, 695 So. 2d 278 (Fla.1997); Barwick v. State, 660 So. 2d 685 (Fla. 1995); Pittman v. State, 646 So. 2d 167 (Fla. 1994). Dr. Berkland explained that a number of Ms. Harrison's wounds were facial cuts that went all the way down to the underlying bone, including cuts through the eyelid region and through the top of her lip. She also had a large cut to her neck which almost severed her trachea. In addition, Ms. Harrison suffered several superficial "poking" wounds, which would not be fatal, but would certainly contribute to the extremely painful manner in which she died. A few of the "stabbing" type wounds were inflicted about the time of Ms. Harrison's death, but there were no injuries which Dr. Berkland would characterize as post-mortem, meaning that all of the injuries occurred prior to her death. Testimony revealed that Ms. Harrison's death may have taken as long as 15 minutes to occur. The utter terror and pain that Ms. Harrison likely experienced during the incident is unfathomable. Words are inadequate to describe this death, but the photographs introduced as evidence de-

pict a person bound, rendered helpless, and brutally, savagely, and unmercifully slashed and disfigured. The murder of Ms. Harrison was conscienceless, pitiless, and unnecessarily torturous. This aggravating circumstance has been proved beyond a reasonable doubt, and the Court assigns it great weight.

The capital felony was committed while the defendant was engaged in the commission of a robbery.

Tonya Wilson, who was an assistant manager at Popeye's at the time of the murder, testified that the door to the restaurant was locked when she arrived there the morning of the murder. Only Ms. Harrison and Defendant were scheduled to work that morning. When Ms. Wilson unlocked the door and entered the restaurant, she found papers on the floor and the safe open. Standard procedure would have dictated that the previous night's proceeds be in the safe, along with the money to be used for change for the coming business day. Ms. Wilson explained that only the manager and assistant manager would have had the combination to the safe. Ms. Wilson described the procedures for making deposits and identified photos of a deposit slip signed by Ms. Harrison along with a deposit bag. According to the penalty phase testimony, approximately $1,751 from the previous day and $375 to be used to make change should have been in the safe. It was not.

Witness Lee Smith testified that Defendant told him prior to the murder that he was going to rob Popeye's. Later, Defendant came to Mr. Smith's home with some money and told him that he had robbed Popeye's and he "had cut her." Mr. Smith saw some blood on Defendant's pants. Defendant asked Mr. Smith to wash his pants, and he did. The money was hidden in Mr.

Smith's room. Additionally, Defendant had a wallet with him which was thrown away in Mr. Smith's backyard garbage can, along with Defendant's shoes. Further testimony revealed that a deposit slip for $1,751 was recovered from the garbage can, along with a bank bag and Ms. Harrison's change purse and driver's license. This aggravator has been proven beyond a reasonable doubt, and the Court assigns it great weight.

STATUTORY MITIGATING CIRCUMSTANCES

The defendant has no significant history of prior criminal activity.

The State concedes that this factor was established. The Court finds that it is entitled to moderate weight.

The defendant was an accomplice in the capital felony and his participation was relatively minor.

Testimony revealed that Defendant was the only person, other than Ms. Harrison, scheduled to work the morning of the murder. Defendant's vehicle was identified by an eyewitness as the car behind Ms. Harrison as she drove to work shortly before her murder. Another witness saw Defendant enter the restaurant shortly before the murder.

As previously noted, Defendant told Mr. Smith prior to the murder that he was going to rob Popeye's. Later, Defendant came to Mr. Smith's home with some money and told him that he had robbed Popeye's and he "had cut her." Mr. Smith saw some blood on Defendant's pants. Defendant asked Mr. Smith to wash his pants, and he did. The money was hidden in Mr. Smith's room. Defendant had a wallet with him, which was thrown away in Mr. Smith's backyard garbage can, along with Defendant's shoes. Defendant and his companions then went to Wal-Mart, where Defendant

bought some shoes, and to a pawn shop, where he bought three rings. Later, a deposit slip for $1,751 was recovered from the garbage can, along with a bank bag and Ms. Harrison's change purse and driver's license. Socks were discovered inside the bank bag, which were eventually determined to have Ms. Harrison's blood on them.

Based on the foregoing, the Court does not find the existence of this mitigator has been reasonably established by the greater weight of the evidence, and therefore it is rejected for consideration.

The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired.

Expert testimony was offered suggesting that Defendant suffers brain damage in areas critical to judgment and impulse control, and that his pattern of brain damage is consistent with fetal alcohol syndrome. However, no expert testified directly that the damage suffered by Defendant rendered him unable to appreciate the criminality of his conduct or to conform his conduct to the law. As noted previously, Defendant had no significant history of prior criminal activity, tending to show that he was in fact capable of conforming his conduct to the law. Moreover, Isaac Sheppard, a defense witness, testified unequivocally that Defendant had an understanding of right and wrong. And, at least two other defense witnesses indicated that when teased, Defendant would get upset, but would not respond in a violent manner. In fact, Defendant's sister testified that she had never seen him react violently when angry. Such testimony is indicative of a person able to conform his conduct appropriately.

The Court also finds Defendant's statement to law enforcement, which showed deliberate attempts to mislead the officers as to his whereabouts and activities the morning of the murder, is indicative of an individual able to appreciate the criminality of his conduct, and capable of conforming his conduct to the law. See Provenzano v. State, 497 So. 2d 1177, 1184 (Fla.1986) (stating that Provenzano's actions on the day of the murder did not support the mitigator that the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired because he concealed the weapons he carried, put change in the parking meter, and took his knapsack out to his car instead of allowing it to be searched because it would have exposed his illegal possession of weapons). See also Nelson v. State, 850 So. 2d 514, 531 (Fla. 2003) (mitigator was not proven where evidence showed the defendant knew his actions were wrong by his attempts to avoid responsibility, which included concealing the victim and lying to the police).

Based on the foregoing, the Court does not find the existence of this mitigator has been reasonably established by the greater weight of the evidence, and therefore it is rejected for consideration.

The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

As noted previously, testimony was offered that Defendant suffers from brain damage in areas which are known to be contributory to impulsive behavior and lack of judgment. "Expert testimony alone does not require a finding of extreme mental or emotional disturbance. Instead, the trial court may disregard expert

opinion where it determines that the opinion is unsupported by the facts or conflicts with other evidence. More specifically, we have held that testimony from lay witnesses concerning the defendant's condition on the day of the murder may serve as competent, substantial evidence to support rejection of expert testimony on the extreme emotional disturbance mitigator." Heyne v. State, 88 So. 3d 113, 125-126 (Fla. 2012) (internal citations and quotations omitted). However, no testimony, expert or otherwise, was given specifically indicating that Defendant was under the influence of extreme mental or emotional disturbance at the time of the crime.

Defendant's conduct on the day of the murder does not evince someone acting under extreme mental or emotional disturbance. Patty Hurst, Defendant's cousin, testified that she saw him around 10:00 or 10:30 a.m. that day, and he was acting normally. Lola Hurst, another cousin, also saw him during that time period and stated he was acting as he always did. Jermaine Bradley, his brother, similarly testified that he spent part of the morning of the murder with Defendant, playing a video game, and afterwards going to Wal-Mart to purchase shoes and to the pawn shop to purchase jewelry.

In addition, the evidence suggests that at least some level of planning was present in the crime. Ms. Knight testified that, to her knowledge, neither the box cutter nor the electrical tape used to bind Ms. Harrison was of a type found in the restaurant. Moreover, Mr. Smith testified that Defendant told him prior to the murder that he planned to rob Popeye's. The facts of the murder and Defendant's conduct following the murder are not consistent with a conclusion that Defendant was suffering from an extreme mental or emo-

tional disturbance. See Hoskins v. State, 965 So. 2d 1, 17 (Fla. 2007).

Based on the foregoing, the Court does not find the existence of this mitigator has been reasonably established by the greater weight of the evidence, and therefore it is rejected for consideration.

The age of the defendant at the time of the crime.

Defendant suggests that his young age, and particularly, his "young mental age," are mitigating in this case. Defendant was chronologically 19 years old at the time of the crime.

Calvin Harris, an administrator at Tate High School, testified that Defendant should have been in special education due to his inability to achieve academically. Jerome Chism, of East Charter School, testified similarly, saying that at 18 or 19 years of age, Defendant's behavior was appropriate to a 12 or 13-year-old. Defendant's family members who testified echoed the opinion that he was "slow," and significantly immature for his age. The testimony of Defendant's family demonstrates that he had difficulties in school, was somewhat limited in his initiative and ability to care for himself, and was a poor reader.

For a "court to give a non-minor defendant's age significant weight as a mitigating circumstance, the defendant's age must be linked with some other characteristic of the defendant or the crime, such as significant emotional immaturity or mental problems." Hurst at 698. Based on the testimony, the Court finds that this mitigator has been reasonably established by the greater weight of the evidence, and gives it moderate weight.

The defendant acted under extreme duress or under the substantial domination of another person.

Although not argued by Defendant in his closing memorandum as a mitigator, certain evidence was presented during the penalty phase suggesting that Defendant was a "follower," and particularly a follower of Mr. Smith. In an abundance of caution, the Court has considered this mitigator and finds that it has not been reasonably established by the greater weight of the evidence. It is rejected from consideration.

NON-STATUTORY MITIGATING CIRCUMSTANCES

The defendant is mentally retarded and suffers from brain damage and fetal alcohol syndrome.

Defendant was not allowed to present evidence during the penalty phase proceedings that mental retardation is a bar to execution. He was, however, allowed to present evidence of mental retardation as mitigation.

In recent IQ testing, Defendant scored a full scale score of 69, according to the expert testimony offered by the defense. Dr. Harry Krop and Dr. Gordon Taub testified that they had reviewed educational records, records from the Department of Corrections, prior testing results, and other relevant documents, and determined that Defendant's adaptive functioning is also deficient, and that these deficiencies were manifest in Defendant prior to the age of 18. Dr. Krop testified that he did intellectual testing with Defendant in January 2012. Defendant and three family members also completed the ABAS, a measurement tool of adaptive functioning. Dr. Krop stated that "all four, including Mr. Hurst's, came out significantly deficient." Dr. Krop also did neuropsychological testing which revealed most-

ly "low average" results, with some tests suggesting either borderline or mild impairment. Based on the totality of his information, Dr. Krop concluded that Defendant is mentally retarded, as did Dr. Taub.

Dr. Harry McClaren testified that he had also reviewed prior testing materials, school records, information regarding the crime, the depositions of Dr. Krop and Dr. Taub, and prior testimony of Defendant's family members. Dr. McClaren indicated that Defendant had previously scored a 76 and a 78 on intelligence tests, and further opined that there was "no objective information suggesting that he was functioning at such a low level as measured by any kind of intelligence testing in the Escambia County School despite coming to the attention of exceptional student services for a language disorder."

"When expert opinion evidence is presented, it 'may be rejected if that evidence cannot be reconciled with the other evidence in the case.' Trial judges have broad discretion in considering unrebutted expert testimony; however, the rejection of the expert testimony must have a rational basis, such as conflict with other evidence, credibility or impeachment of the witness, or other reasons." Williams v. State, 37 So. 3d 187, 204 (Fla. 2010)(internal citations omitted). The Court finds the opinion of Dr. McClaren to be more credible as to mental retardation in light of the circumstances of the case. It was uncontested that Defendant was able to maintain a job and had acquired a driver's license. Further, the Court finds Defendant's statement given to police and his efforts to conceal his involvement in the crime to be particularly persuasive in considering Defendant's adaptive functioning. The statement, given shortly after the crime, reveals an individual clearly recounting a morning's events, giving directions, recalling

telephone numbers, and deliberately omitting certain information tending to incriminate him. Similarly, the evidence offered at trial suggests that Defendant took numerous steps to conceal his involvement in the crime by attempting to clean the murder scene, having his clothes washed, hiding the money in another location, discarding Ms. Harrison's belongings and his shoes, and buying new shoes. Based on the foregoing, the Court does not find that Defendant meets the criteria for mental retardation.

While the Court concludes that Defendant is not mentally retarded, that is not to say that he does not suffer from significant mental issues. The Court accepts the testimony of Dr. Wu as credible. Dr. Wu testified that a PET scan of Defendant revealed that he has "widespread abnormalities in [his] brain in multiple areas," including the frontal lobe area, which is crucial to judgment and impulse control. Dr. Wu also testified that the pattern of brain injury visible on the PET scan is consistent with fetal alcohol syndrome. The testimony of Defendant's mother that she was 15 when she bore him and she drank to excess every day while pregnant with him supports a conclusion that he may well suffer from fetal alcohol syndrome.

All of the experts agreed that Defendant has limited intellectual capacity. In fact, the State concedes as much, and indeed, on the record before the Court, it would be difficult to conclude otherwise. Therefore, the Court finds that Defendant's limited mental capacity has been reasonably established by the greater weight of the evidence, and gives it moderate weight.

CONCLUSION

The Court has given great weight to the jury's recommendation, being ever mindful that a human life is at stake, and has carefully weighed the aggravators and mitigators as outlined above. The Court concludes that the aggravating factors applicable to this crime outweigh the mitigating factors presented. Accordingly, Timothy Lee Hurst, for the murder of Cynthia Lee Harrison, the Court sentences you to be put to death in the manner prescribed by law. The sentence of death is subject to automatic review by the Supreme Court of Florida. The Office of the Public Defender is appointed for the purposes of appeal. Court costs in the amount of $518 are assessed and reduced to civil lien.

DONE and ORDERED at Pensacola, Escambia County, Florida, this 16th day of August, 2012.

/s/ Linda L. Nobles
LINDA L. NOBLES
Circuit Judge

LLN/krw

Copies:
cc: √ John A. Molchan, ASA
√ D. Todd Doss, Esq.
√ Timothy Lee Hurst
√ E.J. Buddy Gissendanner, III, APD

__ Probation Violator	In the Circuit Court, FIRST Judicial Circuit
__ Community Control Violator	in and for ESCAMBIA County, Florida
X Retrial – PENALTY PHASE	Division: C
__ Re-sentence	**Case Number(s):** 1998 CF 001795 A
State of Florida **VS.**	[FILED STAMP: 2012 AUG 16 A 10:3[?]]

TIMOTHY LEE HURST
Defendant

JUDGMENT

The defendant, TIMOTHY LEE HURST, being personally before this court represented by D TODD DOSS, the attorney of record, and the state represented by J. MOLCHAN, and having

X been tried and found guilty X by a jury / ☐ by a court of the following crime(s)

___ entered a plea of guilty to the following crime(s)

___ entered a plea of nolo contendere of the following crime(s)

Count	Crime	Offense Statute Number(s)	Degree of Crime	Case Number(s)
1	FIRST DEGREE PREMEDITATED FELONY MURDER WITH A WEAPON	782.04(1)(a)(1) 775.087	CF	

X and no cause being shown why the defendant should not be adjudicated guilty, **IT IS ORDERED THAT** the defendant is hereby **ADJUDICATED GUILTY** of the above crime(s).

___ and having been convicted or found guilty of, or having entered a plea of nolo contendere or guilty, regardless of adjudication, to attempts or offenses relating to sexual battery (Ch. 794), lewd and lascivious conduct (Ch. 800), or murder (§ 782.04), aggravated battery (§ 784.045), carjacking (§ 812.133), or home invasion robbery (§ 812.135), or any other offense specified in Section 943.325, the defendant shall be required to submit blood specimens or other approved biological specimens.

___ and good cause being shown/ **IT IS ORDERED THAT ADJUDICATION OF GUILT BE WITHHELD**

STATE OF FLORIDA
V.

TIMOTHY LEE HURST — 1998 CF 001795 A
DEFENDANT. — CASE NUMBERS

FINGERPRINTS OF DEFENDANT

1. RIGHT THUMB	2. RIGHT INDEX	3. RIGHT MIDDLE	4. RIGHT RING	5. RIGHT LITTLE
1. LEFT THUMB	**2. LEFT INDEX**	**3. LEFT MIDDLE**	**4.LEFT RING**	**5. LEFT LITTLE**

FINGERPRINTS TAKEN BY:

/s/ [illegible] #623 — DST
NAME — **TITLE**

I HEREBY CERTIFY that the above and foregoing are the fingerprints of the defendant,

TIMOTHY LEE HURST

and that they were placed thereon by defendant in my presence in open court this date.

DONE AND ORDERED in open court ESCAMBIA County, Florida, 16th day of August, 2012

/s/ LINDA R. NOBLES
Judge

STATE OF FLORIDA V.	IN THE CIRCUIT COURT, FIRST JUDICIAL CIRCUIT IN AND FOR ESCAMBIA COUNTY, FLORIDA
	Division C
TIMOTHY LEE HURST	1998 CF 001795 A
DEFENDANT	**Case Numbers (s)**

CHARGES/COSTS/FEES

The defendant is hereby ordered to pay the following sums (if checked):

X $50.00 pursuant to section 938.03, Florida Statutes

X $3.00 as a court cost pursuant to Section 938.01, Florida Statutes (Criminal Justice Tort Fund)

X $2.00 as a court cost pursuant to Section 938.15, Florida Statutes (Criminal Justice Education by Municipalities and Counties)

X A sum of $225.00 pursuant to Section 938.05, Florida Statutes (Additional Court Costs – Felony)

X A sum of $65.00 pursuant to Section 939.185(1), Florida Statutes (Additional Court Costs – County)

X A sum of $50.00 pursuant to Section 775.083(2), Florida Statutes (Crime Prevention Programs)

X A sum of $3.00 pursuant to CO 05.51 and Section 938.19, Florida Statutes (Teen

Court)

X $20.00 to Crimestoppers® pursuant to Section 938.06, Florida Statutes

___ A sum of $101.00 pursuant to Section 938.10(1), Florida Statutes (Child Advocacy Trust Fund

___ A sum of $151.00 pursuant to Section 938.10(1), Florida Statutes (Rape Crisis - Sexual Assault/Battery)

___ A sum of $201.00 pursuant to Section 938.08, Florida Statutes (Domestic Violence Trust Fund)
Restitution

___ A sum of $___ pursuant to Section 938.29, Florida Statutes (Public Defender Fees)

___ A sum of $50.00 pursuant to Section 27.52(1)(c), Florida Statutes (Public Defender Application Fee)

___ A sum of $___ pursuant to Section 938.27, Florida Statutes (☐ Prosecution / ☐ Investigative Costs to:

X All money obligations to be reduced to lien

___ Other

DONE AND ORDERED in open court at **ESCAMBIA** County, Florida, this 16th day of August, 2012.

/s/ LINDA R. NOBLES
Judge

SENTENCE
As to Count 1

The defendant, being personally before the court, accompanied by the defendant's attorney of record, and having been adjudicated guilty herein, and the court having given the defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why the defendant should not be sentenced as provided by law, and no cause being shown

(Check one if applicable)

___ and the court having on _____ (Date) deferred imposition of sentence until this date.

_X_ and the court having previously entered a judgment in this case on 4/26/2000 (Date) now re-sentences the defendant

___ and the court having placed the defendant on ☐ probation / ☐ community control and having subsequently revoked the defendant's ☐ probation / ☐ community control

It Is the Sentence Of The Court That:

___ The defendant pay a fine of $_____, pursuant to Section 775.083, Florida Statutes, plus $_____ as the 5% surcharge required by Section 938.04 Florida Statutes.

_X_ The defendant is hereby committed to the custody of the Department of Corrections.

___ The defendant is hereby committed to the custody of the Sheriff of Escambia County, Florida.

___ The defendant sis sentenced as a youthful offender in accordance with Section 958.04, Florida Statutes.

To Be Imprisoned (check one); Unmarked sections are inapplicable:

___ For a term of natural life.

_X_ For a term of sentenced to Death _____

___ Said SENTENCE SUSPENDED for a period of _____ subject to conditions set forth in this order.

If "Split" Sentence, Complete the Appropriate Paragraph.

___ Followed by a period of _____ on ☐ probation / ☐ community control under the supervision of the Department of Corrections according to the terms and conditions of supervision set forth in separate order.

___ However, after serving a period of _____ imprisonment in _____, the balance of the sentence shall be suspended and the defendant shall be placed on probation/community control for a period of _____ under supervision of the Department of Corrections according to the terms and conditions of ☐ probation / ☐ community control set forth in a separate order.

In the event the defendant is ordered to serve additional split sentences, all incarceration portions shall be satisfied before the defendant begins service of the supervision terms.

SPECIAL PROVISIONS
As to Count 1

By appropriate notation, the following provisions apply to the sentence imposed:

Mandatory / Minimum Provisions:

Firearm

___ It is further ordered that the 3-year minimum imprisonment provision of Section 775.087(2), Florida Statutes, is hereby imposed for the sentence specified in this count.

Drug Trafficking

___ It is further ordered that the _____ mandatory minimum imprisonment provision of Section 893.135(1), Florida Statutes, is hereby imposed for the sentence specified in this count.

Controlled Substance Within 1,000 Feet of School

___ It is further ordered that the 3-year minimum imprisonment provision of Section 893.13(1)(e)1, Florida Statutes, is hereby imposed for the sentence specified in this count.

Habitual Felony Offender

___ The defendant is adjudicated a habitual violent felony offender and has been sentenced to an extended term in accordance with the provisions of Section 775.084(4)(a), Florida Statutes. The requisite findings by the court are set forth in a separate order or stated on the record in open court.

Habitual VIOLENT Felony Offender

___ The defendant is adjudicated a habitual violent felony offender and has been sentenced to an extended term in accordance with the provisions of Section 775.084(4)(b), Florida Statutes. A minimum term of _____ year(s) must be served prior to release. The requisite findings of the court are set forth in a separate order or stated on record in open court.

Law Enforcement Protection Act

___ It is further ordered that the defendant shall serve a minimum of _____ year(s) before release in accordance with Section 775.0823, Florida Statutes.

Capital Offense

___ It is further ordered that the defendant shall serve no less that 25 years in accordance with the provisions of Section 775.082(1), Florida Statutes.

Short-Barreled Rifle, Shotgun, Machine Gun

___ It is further ordered that the 5-year minimum provisions of Section 790.221(2), Florida Statutes, are hereby imposed for the sentence specified in this count.

Continuing Criminal Enterprise

___ It is further ordered that the 25-year minimum sentence provisions of Section 893.20, Florida Statutes, are hereby imposed for the sentence specified in this count.

Taking a Law Enforcement Officer's Firearm

___ It is further ordered that the 3-year mandatory minimum imprisonment provision of Section 775.0857(1), Florida Statutes, is hereby imposed for the sentence specified in this count.

Prison Releasee Re-offender

SPECIAL PROVISIONS
As to Count 1

Other Provisions:

Retention of Jurisdiction

___ The court retains jurisdiction over the defendant pursuant to Section 947.16(3), Florida Statutes (1983).

Jail Credit

_X_ It is further ordered that the defendant shall be allowed a total of 1 year plus 358 days as credit for time incarcerated before imposition of this sentence. **Plus all time previously in DOC.**

CREDIT FOR TIME SERVED
IN RE-SENTENCING AFTER
VIOLATION OF PROBATION
OR COMMUNITY CONTROL

___ It is further ordered that the defendant be allowed _____ days time served between date of arrest as a violator following release from prison to the date of resentencing. The Department of Corrections shall apply original jail time credit and shall compute and apply credit for time served and un-forfeited gain time previously awarded on case/count _____ (Offenses committed before October 1, 1989).

___ It is further ordered that the defendant be allowed _____ days time served between date of arrest as violator following release from prison to the date of re-

sentencing. The Department of Corrections shall apply original jail time credit and shall compute and apply credit for time served on case/count _____ (Offenses committed between October 1, 1989 and December 21, 1993)

___ The court deems the unforfeited gain time previously awarded on above case/count forfeited under Section 948.06(6).

___ The court allows un-forfeited gain time previously awarded on the above case/count. (Gain time may be subject to forfeiture by the Department of Corrections under Corrections under Section 944.28(1).

___ It is further ordered that the defendant be allowed ____ days time served between the date of arrest as a violator following release from prison to the date of resentencing. The Department of Corrections shall apply original jail time credit and shall compute and apply credit for time served only pursuant to Section 921.0017, Florida Statutes, on case/count _____ (Offense committed on or after January 1, 1994)

Consecutive/Concurrent as to Other Counts

It is further ordered that the sentence imposed for this count shall run (check one)

____ consecutive to ___ concurrent with

the sentence set forth in count _____ of this case.

Consecutive/Concurrent as to Other Convictions

It is further ordered that the composite term of all sentences imposed for the count specified in this order shall run (check one) ___ consecutive to ___ concurrent with the following (check one):

___ Any active sentence being served.

___ Specific sentences: _____

_____

_____

In the event the above sentence is to the Department of Corrections, the Sheriff of **ESCAMBIA** County Florida, is hereby ordered and directed to deliver the defendant to the Department of Corrections at the facility designated by the department together with a copy of this judgment and sentence, and any other documents specified by Florida Statute.

The defendant in open court was advised of the right to appeal from this sentence by filing notice of appeal within 30 days from this date with the clerk of this court and the defendant's right to the assistance of counsel in taking the appeal at the expense of the state on showing of indigency.

In imposing the above sentence, the court further recommends _____

_____

_____

_____

_____

___ Defendant remanded to custody to being serving sentence.

DONE AND ORDERED in open court at **ESCAMBIA** County, Florida, this 16th day of August, 2012.

/s/ LINDA R. NOBLES
Judge

STATE OF FLORIDA

UNIFORM COMMITMENT TO CUSTODY
OF DEPARTMENT OF CORRECTIONS

The Circuit Court of **ESCAMBIA** County
in the **SPRING** Term, **2012** in the case of

STATE OF FLORIDA

vs.

TIMOTHY LEE HURST

CASE NO: 1998 CF 001795 A

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA, TO THE SHERIFF OF SAID COUNTY AND THE DEPARTMENT OF CORRECTIONS OF SAID STATE:

The above named defendant, having been duly charged with the offense specified herein in the above styled court, and he/she having been duly convicted and adjudged guilty of and sentenced for said offense by said Court, as appears from the attached certified copies of Indictment/Information, Judgment and Sentence, and Felony Disposition which are hereby made parts hereof;

Now therefore, this is to command you, the Sheriff, to take and keep and, within a reasonable time after receiving this commitment, safely deliver the said defendant, together with any pertinent Investigation Report prepared in this case, into the custody of the Department of Corrections of the State of Florida; and this is to command you, the said Department of Corrections, by and through your Secretary, Regional Directors, Superintendents, and other officials, to keep and safely imprison the said defendant for the term of said sentence in the institution in the state correctional sys-

tem to which you, the said Department of Corrections, may cause the said defendant to be conveyed or thereafter transferred. And these presents shall be your authority for the same. Herein fail not.

WITNESS the Honorable LINDA NOBLES, Judge of said Court, as also ERNIE LEE MAGAHA CLERK, and Seal thereof, this 16 AUGUST, 2012.

ERNIE LEE MAGAHA CLERK

/s/ Paula [Illegible]
By: Deputy Clerk

[Court Seal]

SUPREME COURT OF FLORIDA

TIMOTHY LEE HURST,
Appellant.

v.

STATE OF FLORIDA,
Appellee.

No. SC12-1947
May 1, 2014
Rehearing Denied Sept. 4, 2014
[147 So. 3d 435]

PER CURIAM.

Timothy Lee Hurst appeals his sentence of death that was imposed for the 1998 first-degree murder of Cynthia Harrison. We have jurisdiction. *See* art. V. § 3(b)(1), Fla. Const. For the reasons set forth below, we affirm his sentence.

FACTS AND PROCEDURAL HISTORY

Hurst was convicted for the May 2, 1998, first-degree murder of Cynthia Harrison in a robbery at the Popeye's restaurant where Hurst was employed in Escambia County, Florida. The victim, also an employee, had been bound and gagged and repeatedly cut and stabbed with a weapon consistent with a box cutter found at the scene. Hurst's conviction and death sentence were originally affirmed in *Hurst v. State*, 819 So.2d 689 (Fla.2002). In that decision, we set forth the facts surrounding the murder as follows:

> On the morning of May 2, 1998, a murder and robbery occurred at a Popeye's Fried Chicken

restaurant in Escambia County, Florida, where Hurst was employed. Hurst and the victim, assistant manager Cynthia Lee Harrison, were scheduled to work at 8 a.m. on the day of the murder. A worker at a nearby restaurant, Carl Hess, testified that he saw Harrison arriving at work between 7 a.m. and 8:30 a.m. Afterwards, Hess said that he saw a man, who was about six feet tall and weighed between 280 and 300 pounds, arrive at Popeye's and bang on the glass windows until he was let inside. The man was dressed in a Popeye's uniform and Hess recognized him as someone he had seen working at Popeye's. Shortly after the crime, Hess picked Hurst from a photographic lineup as the man he had seen banging on the windows. Hess was also able to identify Hurst at trial.

On the morning of the murder, a Popeye's delivery truck was making the rounds at Popeye's restaurants in the area. Janet Pugh, who worked at another Popeye's, testified she telephoned Harrison at 7:55 a.m. to tell her that the delivery truck had just left and Harrison should expect the truck soon. Pugh spoke to the victim for four to five minutes and did not detect that there was anything wrong or hear anyone in the background. Pugh was certain of the time because she looked at the clock while on the phone.

Popeye's was scheduled to open at 10:30 a.m. but Harrison and Hurst were the only employees scheduled to work at 8 a.m. However, at some point before opening, two other Popeye's employees arrived, in addition to the driver of the supply truck. None of them saw Hurst or

his car. At 10:30 a.m., another Popeye's assistant manager, Tonya Crenshaw, arrived and found the two Popeye's employees and the truck driver waiting outside the locked restaurant.

When Crenshaw unlocked the door, and she and the delivery driver entered, they discovered that the safe was unlocked and open, and the previous day's receipts, as well as $375 in small bills and change, were missing. The driver discovered the victim's dead body inside the freezer. The victim had her hands bound behind her back with black electrical tape and she also had tape over her mouth. Similar tape was later found in the trunk of Hurst's car. The scene was covered with a significant amount of the victim's blood, and it was apparent from water on the floor that someone had attempted to clean up the area.

The victim suffered a minimum of sixty incised slash and stab wounds, including severe wounds to the face, neck, back, torso, and arms. The victim also had blood stains on the knees of her pants, indicating that she had been kneeling in her blood. A forensic pathologist, Dr. Michael Berkland, testified that some of the wounds cut through the tissue into the underlying bone, and while several wounds had the potential to be fatal, the victim probably would not have survived more than fifteen minutes after the wounds were inflicted. Dr. Berkland also testified that the victim's wounds were consistent with the use of a box cutter. A box cutter was found on a baker's rack close to the victim's body. Later testing showed that the box cutter had the victim's blood on it. It was not the type

of box cutter that was used at Popeye's, but was similar to a box cutter that Hurst had been seen with several days before the crime.

Hurst's friend, Michael Williams, testified that Hurst admitted to him that he had killed Harrison. Hurst told him that he had an argument with the victim, she "retaliated," and that Hurst hit the victim and cut her with a box cutter. Hurst said he had killed the victim because, "he didn't want the woman to see his face." Williams stated that Hurst had talked about robbing Popeye's on previous occasions.

Another of Hurst's friends, "Lee-Lee" Smith, testified that the night before the murder, Hurst said he was going to rob Popeye's. On the morning of the murder, Hurst came to Smith's house with a plastic container full of money from the Popeye's safe. Hurst instructed Smith to keep the money for him. Hurst said he had killed the victim and put her in the freezer. Smith washed Hurst's pants, which had blood on them, and threw away Hurst's socks and shoes. Later that morning, Smith and Hurst went to Wal-Mart to purchase a new pair of shoes. They also went to a pawn shop where Hurst saw some rings he liked, and after returning to Smith's house for the stolen money, Hurst returned to the shop and purchased the three rings for $300. An employee at the shop, Bob Little, testified that on the day of the murder, a man fitting Hurst's description purchased three rings. Little picked Hurst out of a photographic lineup as the man who had purchased the rings. The police recovered the three rings from Hurst.

Smith's parents were out of town the weekend of the murder but upon their return, and after discovering the container with the money from Popeye's in Smith's room, Smith's mother contacted the police and turned the container over to them. The police interviewed Smith and searched a garbage can in Smith's yard where they found a coin purse that contained the victim's driver's license and other property, a bank bag marked with "Popeye's" and the victim's name, a bank deposit slip, a sock with blood stains on it, and a sheet of notebook paper marked "Lee Smith, language lab." On the back of the notebook paper someone had added several numbers, and one number was the same as the amount on the deposit slip. Smith's father also gave the police a pair of size fourteen shoes that appeared to have blood stains on them and that he had retrieved from the same trash can.

Jack Remus, a Florida Department of Law Enforcement (FDLE) crime lab analyst, testified that the shoes were tested with phenolpthalein to detect blood, and while the test results exhibited some of the chemical indications associated with blood, attempts at DNA testing were not successful. Remus also tested the blood-stained sock and determined that the DNA typing was consistent with the victim. Hurst's pants were also tested, but no blood evidence was detected. FDLE fingerprint expert Paul Norkus testified that the deposit slip in the garbage can had three of Hurst's fingerprints on it.

At trial, the State played the tape of an interview the police had conducted with Hurst

> shortly after the murder. Hurst said that on the morning of the murder he was on his way to work and his car broke down. He said that he telephoned Harrison at Popeye's to say he was unable to come to work, and when he talked to her, she sounded scared and he heard whispering in the background. Hurst then went to Smith's house and changed out of his work clothes. Hurst said he went to the pawn shop and bought necklaces for friends, but he did not mention purchasing the three rings or buying a new pair of shoes at Wal-Mart.
>
> At the close of the guilt phase of the trial, the jury deliberated for approximately six hours before finding Hurst guilty of first-degree murder.

Hurst, 819 So.2d at 692-94 (footnotes omitted).

Hurst filed his initial, amended postconviction proceeding in circuit court.[1] On appeal from denial of post-

---

[1] The claims raised in the initial postconviction motion were: (1) the State withheld material and exculpatory evidence and/or presented misleading and false testimony, i.e., false testimony of inmate witness Anthony Williams that defendant confessed, in exchange for promises of leniency for Williams; suppression of testimony of David Kladitis that three or four black males were in the Popeye's parking lot at 7:00 a.m.; false testimony and argument about defendant failing to mention his trip to Wal-Mart; withholding the fact that the State planned to indict witness Lee ("Lee-Lee") Smith; and cumulative effect of these errors; (2) newly discovered evidence concerning Anthony Williams that his testimony of Hurst's confession was fabricated, newly discovered evidence that jail witness Willie Griffin (Anthony's cousin) testified falsely against defendant, and newly discovered evidence from inmate Edison Sartes that Griffin's testimony was false; new information that primary witness Lee-Lee Smith was going to be and was charged in the case, when at the time of trial he had not been charged; false

conviction relief, we affirmed on all but one of his post-conviction claims. *See Hurst v. State*, 18 So.3d 975 (Fla.2009). Although we concluded that the State should have disclosed certain field notes by investigator Donald Nesmith, and that the trial court's refusal to perpetuate the testimony of Willie Griffin was an abuse of discretion, we concluded no prejudice accrued from those errors. *Id.* at 1015. However, we reversed the denial of relief on Hurst's claim of ineffective assistance of counsel in investigation and presentation of mitigation in the penalty phase, and remanded for a new penalty phase proceeding. *Id.* at 1008. In granting a new

---

testimony of witness Carl Hess, who identified defendant based on a false claim of a prior job interview of defendant; and inappropriate conversation at trial between Hess and Kladitis; (3) defense counsel was ineffective in that he failed to adequately investigate and/or present exculpatory and impeachment evidence of potential witness Andrew Salter who was at the crime scene and who would have said he did not see defendant or his car there; failing to secure the testimony of inmate Brett Pleasant regarding his conversations with witness Anthony Williams; failing to object to inadmissible testimony and evidence of defendant's lack of remorse; failing to move for mistrial after an emotional display by the victim's family; failing to object or move for mistrial concerning evidence of physical abnormality of the victim given to create sympathy; and cumulative effect of these errors; (4) counsel failed to adequately investigate and present mitigation in the penalty phase about defendant's childhood, lack of parental support, poverty, physical and mental abuse, drug and alcohol abuse; and counsel's failure to seek a psychiatric evaluation and to present mental mitigation including evidence of neurological and mental deficits and brain damage; (5) defendant may not be executed because he is mentally retarded under *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002); (6) Florida's capital sentencing statute violates the Eighth and Fourteenth Amendments to the United States Constitution and *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002); (7) cumulative error unconstitutionally deprived defendant of a fair trial, requiring a new trial. Not all the claims raised in the postconviction motions were appealed.

penalty phase, we explained that there was no sound basis for Hurst's defense counsel to have failed to investigate and present evidence of Hurst's borderline intelligence, possible organic brain damage, the fact that he was in special education classes as a child, and other mitigation for which there appeared to be no apparent disadvantage in presentation. *See id.* at 1013-15.

Prior to the new sentencing trial, the trial court denied Hurst's successive motion for an evidentiary hearing on mental retardation.[2] In addition, the court denied Hurst's request to present mental retardation to the penalty phase jury as an absolute bar to recommendation of a death sentence, although the court allowed him to present mental retardation and other mental issues as mitigation to the jury. After the new penalty phase evidence was presented, in which the State presented an abbreviated version of the trial testimony as to the circumstances of the murder, and after the defense presented testimony concerning mitigation, the jury returned a recommendation of death by a seven-to-five vote.

Before sentencing, the trial court held a *Spencer*[3] hearing at which defense counsel presented further argument that the evidence at the penalty phase established that Hurst was mentally retarded. The trial

---

[2] The 2013 Legislature amended all Florida statutes that refer to "mental retardation," "retardation," and "mentally retarded" to now refer to "intellectual disability" or "intellectually disabled." *See* ch.2013-162, Laws of Fla.; *see, e.g.*, section 921.137, Florida Statutes (2013), titled "Imposition of the death sentence upon an intellectually disabled defendant prohibited." Because the prior statute was in effect when Hurst raised the issue in the trial court, we continue to use the terms "mental retardation" and "mentally retarded" in this opinion.

[3] *Spencer v. State*, 615 So.2d 688 (Fla.1993).

court subsequently entered a sentencing order sentencing Hurst to death. In doing so, the court found as aggravating factors that (1) the murder was especially heinous, atrocious or cruel, *see* § 921.141(5)(h), Fla. Stat. (2012), which was assigned great weight; and (2) the murder was committed while Hurst was engaged in commission of a robbery, *see* § 921.141(5)(d), Fla. Stat. (2012), which was assigned great weight. In mitigation, the trial court found the following two statutory mitigators: (1) no significant history of prior criminal activity, *see* § 921.141(6)(a), Fla. Stat. (2012), which was assigned moderate weight; and (2) Hurst's age of 19 and his young mental age, *see* § 921.141(6)(g), Fla. Stat. (2012), which was assigned moderate weight. The trial court found as additional mitigation under section 921.141(6)(h), Florida Statutes (2012), that Hurst had significant mental issues—limited mental and intellectual capacity with widespread abnormalities in his brain affecting impulse control and judgment consistent with fetal alcohol syndrome, which was assigned moderate weight—although the court expressly found that Hurst is not mentally retarded. The trial court rejected as unproven proffered mitigating factors that the defendant was under the influence of mental or emotional disturbance; the defendant was an accomplice with relatively minor participation; the defendant acted under extreme duress or substantial domination of another; or the defendant lacked the capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of law. *See* §§ 921.141(6)(b), (d), (e), & (f), Fla. Stat. (2012).

Hurst took a timely appeal from the sentence of death raising the following issues: (1) whether the trial court erred in refusing to give him a separate evidentiary hearing on his successive mental retardation

claim, in refusing to allow the jury to determine mental retardation as a bar to execution, and in finding after trial that he is not mentally retarded and exempt from execution; (2) whether this Court should recede from precedent holding that the jury need not expressly find specific aggravators or issue a unanimous advisory verdict on the sentence; and (3) whether his death sentence is proportionate. We turn to Hurst's first issue on appeal.

ANALYSIS

A. Mental Retardation Issues

The United States Supreme Court held in *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), that the Eighth Amendment to the United States Constitution forbids execution of mentally retarded defendants. However, the Supreme Court left it to the states to determine the manner in which this constitutional restriction on execution of its sentences will be enforced. *Id.* at 317, 122 S.Ct. 2242. Florida law sets forth a three-pronged test to determine mental retardation as a bar to the death penalty. In order to prove mental retardation as a bar to execution, the defendant must prove all three of the following factors: (1) significantly subaverage general intellectual functioning, which has been interpreted to be a full scale IQ of 70 or below on a standardized intelligence test; (2) concurrent deficits in adaptive behavior; and (3) manifestation of the condition before age eighteen. *See, e.g., Nixon v. State*, 2 So.3d 137, 142 (Fla.2009); § 921.137(1), Fla. Stat. (2012). The burden is on the defendant raising a claim of mental retardation as a bar to execution to prove mental retardation by clear and convincing evidence. *See Nixon*, 2 So.3d at 145; § 921.137(4), Fla. Stat. (2012).

Hurst contends that the trial court erred in denying a successive mental retardation hearing pursuant to Florida Rule of Criminal Procedure 3.203. He contends that he is mentally retarded and exempt from execution based on a recent Wechsler Adult Intelligence Scale, Fourth Edition (WAIS-IV) test that indicated his full scale IQ is 69, and based on expert testimony that he suffered from adaptive deficits—all before age eighteen—such that he met the statutory requirements for mental retardation. Hurst was previously provided a full evidentiary hearing on the question of mental retardation in his initial postconviction proceeding. At that evidentiary hearing, Hurst presented the expert testimony of Dr. Valerie McClain, a licensed clinical psychologist, who administered a number of tests to Hurst, including the Wechsler Abbreviated Scale of Intelligence (WASI). That test placed Hurst in the borderline range with a full scale IQ score of 70. As to deficits in adaptive functioning, Dr. McClain testified that in her opinion Hurst did not meet the adaptive functioning deficit threshold for mental retardation, and she did not determine that Hurst is mentally retarded. At that same evidentiary hearing, the State presented clinical psychologist Dr. James D. Larsen. After testing Hurst with the WAIS-III test, Dr. Larsen concluded that Hurst's full scale IQ was 78. Dr. Larsen also found no deficits in adaptive functioning necessary for a diagnosis of mental retardation. The circuit court in that initial postconviction proceeding denied the mental retardation claim, relying primarily on the testimony of Dr. McClain and Dr. Larsen that Hurst's adaptive behavior was not substantially impaired; however, no appeal was taken of that ruling when it was denied in 2007. *See Hurst*, 18 So.3d at 1008 n. 9.

In this case, Hurst contends that the trial court should have held a second *Atkins* mental retardation hearing prior to the new sentencing trial. The trial court denied the request for a pretrial evidentiary hearing on several grounds, one of which was that the motion was untimely under the requirements of rule 3.203. We conclude that denial of the request for a second *Atkins* hearing was not an abuse of discretion under the circumstances present in this case. *See, e.g., Arbelaez v. State*, 898 So.2d 25, 42-43 (Fla.2005) (reviewing a trial court's decision not to allow supplemental *Ring* and *Atkins* claims on remand under an abuse of discretion standard). Moreover, any error in denying the pre-trial evidentiary hearing on mental retardation was harmless because Hurst was allowed to present all his mental retardation evidence at the penalty phase, after which the trial court ruled that he failed to establish that he is mentally retarded. The background and mental mitigation evidence presented by Hurst at the penalty phase is discussed next.

Hurt's sister, Sequester "Tina" Hurst; brother, Jermaine Bradley; mother, Bertha Bradley; father, Timothy Bradley; Bible study teacher, Isaac Sheppard; administrator at Hurst's high school, Calvin Harris; and former United States Army Major and principal of East Charter School, Jerome Chism, all testified concerning Hurst's family and background. Hurst's mother was age fifteen when Hurst was born and, during pregnancy, she drank all day, every day. As a child, Hurst stuttered and developed very slowly. As a toddler, he was slow to learn to walk. He was disciplined harshly when he was growing up and was punished more than the other children because he could not do things correctly.

Hurst was a fun-loving child and teenager with a good personality. He liked to play jokes and was mild tempered, but was slow mentally and did very poorly in school. In Bible study classes as a child, Hurst was unable to progress out of the most basic children's Bible study book and could not look up the Bible verses that went with the stories. He was embarrassed because he had difficulty reading. Hurst should have been in special education classes because he was low functioning and could not understand what was going on in class; and for that reason, he would skip class and play basketball in the gym. Even though his school wanted to place Hurst in a special education program, his mother objected because she was afraid he would be picked on. He did go to East Charter School, which taught low achievers and children with behavioral problems, and while there, was teased about his large size and his slowness. His maturity level remained very low and even at age eighteen, he exhibited the maturity of a middle-school student. Hurst could not obtain a GED, but did have a driver's license and obtained a car with his father's help, although he was a poor driver.

Family members testified that Hurst had to be reminded to take care of himself; and he allowed his mother and sister to wash his clothes, and allowed his mother to cook for him. He had poor hygiene and had to be reminded to bathe and dress appropriately. He had to be reminded to keep appointments and be awakened for work. Hurst did not have a checking account and would likely have had difficulty making change if he was working a cash register. However, Hurst was employed at Popeye's and did food "prep work."

Dr. Joseph Wu, a psychiatrist, professor of psychiatry, and clinical director of the University of California at Irvine College of Medicine Brain Imaging Center,

testified as an expert on the use of positron emission tomography (PET) in regard to neurological and psychiatric disorders. He was present when a PET scan was performed on Hurst and later interpreted the results of that PET scan. Dr. Wu testified that the scan showed a decreased cortical cerebellum metabolic rate, which indicated widespread damage to the cortical region of Hurst's brain. He opined that Hurst has widespread abnormalities in multiple areas of his brain, which abnormalities are associated with lack of judgment, risk taking, impulsivity, and immaturity. Dr. Wu was aware that it was reported Hurst suffered from fetal alcohol syndrome, which, along with other trauma, can cause the types of problems seen in Hurst's PET scan, although he could not say from the PET scan what caused the abnormalities in Hurst's brain.

Dr. Harry Krop, a clinical and forensic psychologist, testified that he administered the WAIS-IV test, as well as a test of memory malingering (TOMM), to Hurst in January and February 2012. The testing resulted in a full scale IQ of 69, which is in the range of mental retardation. Dr. Krop reviewed details of the murder, Hurst's regular school records, the charter school records, Florida Department of Corrections records, tests and reports of other testing performed on Hurst, and Dr. Wu's PET scan report. He also spoke to various family members for the purpose of evaluating Hurst's adaptive functioning as measured by completion of the Adaptive Behavior Assessment System (ABAS). He did not listen to the recorded statement Hurst gave to police. After reviewing the questionnaire for the ABAS, which was completed by Hurst and three family members, Dr. Krop concluded that Hurst is significantly deficient in all areas of adaptive functioning. Dr. Krop was aware of earlier testing in which

Hurst scored in the 78 IQ range on a different WAIS test, which Dr. Krop opined was not as accurate as the newer WAIS-IV, and his final opinion was that Hurst is mentally retarded.

Dr. Gordon Taub, psychologist and associate professor at the University of Central Florida specializing in measurement of intelligence, structure of intelligence, intelligence theory, and evaluation of intelligence tests, testified that he has written articles about the Wechsler Scale of Intelligence tests. He testified that the WAIS-IV, which was revised in 2008, now measures four areas of intelligence, made changes in the subtests, and added some completely new tests. Dr. Taub was aware that Hurst received a full scale IQ score of 78 on the earlier WAIS-III test in 2004, which he said tested for only two main factors. He agreed that on the WAIS-IV test, which was given by Dr. Krop and which tests for four main factors, Hurst received a full scale score of 69. Dr. Taub opined that scores on the current WAIS-IV and earlier Wechsler tests cannot properly be compared because of the changes to the newer test and because the WAIS-IV is a much better test. However, Dr. Taub agreed that the WAIS-III is a "valid score of intelligence and there's no reason not to use that score if you attained it at the time that it was the test to use to measure intelligence."

Dr. Taub testified that other testing done on Hurst when he was under the age of eighteen and still in school showed depressed scores. As to Hurst's adaptive functioning, Dr. Taub testified that the information gathered by Dr. Krop showed Hurst was impaired in functioning in the real world in areas of self-care and in communication. Dr. Taub administered the Woodcock Johnson Test of Achievement, Third Edition, to Hurst, which tests areas in reading, writing, math, and

spelling. He opined that Hurst's limited proficiency shown on the achievement test is consistent with his school records showing low performance. He concluded based on the WAIS-IV test and on information concerning Hurst's adaptive functioning, school records, and achievement testing, that Hurst meets the legal criteria for mental retardation in Florida.

The State presented the testimony of Dr. Harry McClaren, forensic psychologist, who testified that he reviewed court documents, the testimony of Hurst's family members, the testimony of Drs. McClain and Larson at the prior evidentiary hearing, mental health records from the Department of Corrections, educational records and school test results, information about the crime, Hurst's statement to police, and the testimony of Drs. Taub and Krop. Dr. McClaren also reviewed a WAIS-III test given to Hurst by a Dr. Riebsame in 2003 and the WASI (Wechsler Abbreviated Scale of Intelligence) given by Dr. McClain in 2004. He testified that it would be a mistake to ignore Hurst's past testing with the WAIS-III resulting in full scale IQ scores of 76 and 78 because that test was the state of the art instrument at the time. Dr. McClaren also testified that there was no adaptive behavior testing done when Hurst was young, and now the reports of his deficits are anecdotal. He opined that Hurst does not meet the criteria for mental retardation.

The trial court relied primarily on the testimony of Dr. McClaren and on evidence of Hurst's actions in and around the time of the crime in determining that Hurst did not meet the test for mental retardation as a bar to the death penalty. In addition to testimony of members of law enforcement who investigated the crime and recovered evidence from Lee-Lee Smith's house, the State presented Hurst's statement given to detectives

at the time. After Hurst signed a waiver of his rights and agreed he was speaking voluntarily with the detectives, he gave a narrative of what he said he did that morning in which he described going to a friend's house to unsuccessfully try to use the telephone because, he said, his car broke down. He gave street directions to that friend's house. Hurst said he then went to the E-Z Serve to use the pay telephone to call Popeye's and tell Cynthia Harrison he would not be able to come into work. He said that she spoke "in a scary voice" with a "scary tone," and he could hear some whispering in the background. He recited the telephone number that he called to talk with her. Hurst also related to detectives that he went to Lee-Lee Smith's house that morning, and then to his own house where his brother Jermaine asked Hurst to take him to a pawn shop. Hurst described putting something in his car to clean out the gas tank and then driving to the pawn shop with Jermaine, Lee-Lee, and another young man. Hurst said in his statement that he bought his brother two necklaces at the pawn shop with his brother's money. Hurst told detectives that after leaving Lee-Lee Smith's house and before going to the pawn shop, he changed his shirt and shoes but not his work pants. Timothy Bradley, Hurst's biological father, testified that on the morning of May 2, 1998, at around 7:45 a.m., he saw Hurst putting the battery back into his car after the battery had been on the charger all night. At that time, Hurst was wearing his Popeye's uniform.

The trial court concluded in the sentencing order that Hurst was able to maintain a job and had acquired a driver's license. The court noted that Hurst's statement to police and his efforts to conceal his involvement in the crime were particularly persuasive in determining that Hurst did not suffer significant deficits in

adaptive functioning. The court stated, "The statement, given shortly after the crime, reveals an individual clearly recounting a morning's events, giving directions, recalling telephone numbers, and deliberately omitting certain information tending to incriminate him. Similarly, the evidence offered at trial suggests that Defendant took numerous steps to conceal his involvement in the crime by attempting to clean the murder scene, having his clothes washed, hiding the money in another location, discarding Ms. Harrison's belongings and his shoes, and buying new shoes." We also note that evidence that Hurst was a nineteen-year-old who still lived at home and allowed his mother and sister to cook for him and do his laundry does not establish that he is unable to care for himself. Because the trial court had before it competent, substantial evidence to support its conclusion that Hurst is not mentally retarded under the three-prong test set forth in Florida law, we find no error in this ruling.

Although Hurst was allowed to present all his mental retardation and other mental mitigation to the jury, he also contends that the trial court erred in refusing to submit the question of mental retardation as a bar to the death penalty to the jury for its determination. This claim lacks merit. We have repeatedly held that a defendant has no right under *Atkins* to a jury determination of whether he is mentally retarded. *See Hodges v. State*, 55 So.3d 515, 526 (Fla.2010) (holding that defendant is not entitled to a jury determination of his mental retardation status), *cert. denied*, — U.S. —, 132 S.Ct. 164, 181 L.Ed.2d 77 (2011); *Kilgore v. State*, 55 So.3d 487, 510-11 (Fla.2010) (reiterating that the capital defendant has no right under *Atkins* to a jury determination whether he is mentally retarded); *Rodriguez v. State*, 919 So.2d 1252, 1267 (Fla.2005) (same). Some

states have established procedures under which a jury does determine if a capital defendant is mentally retarded. *See, e.g., Commonwealth v. Sanchez*, 614 Pa. 1, 36 A.3d 24, 60-61 (2011) (discussing survey of state law on procedures for determining mental retardation in capital cases). Florida is not one of those states, and the United States Supreme Court has not mandated any specific procedure for making the determination of mental retardation in the capital sentencing context. Thus, the trial court did not err in refusing to submit to the jury the question of Hurst's mental retardation as a bar to the death penalty in this case.

B. Lack of Jury Findings as to Specific Aggravators and Lack of a Unanimous Advisory Verdict on the Sentence

Hurst next contends that constitutional error occurred in his case because the advisory jury in the penalty phase was not required to find specific facts as to the aggravating factors,[4] and that the jury was not required to make a unanimous recommendation as to the sentence. In this case, the jury voted seven to five to recommend a death sentence be imposed. Hurst bases his claims on the United States Supreme Court's decision in *Ring*, which held that capital defendants are entitled to a jury determination of any fact on which the legislature conditions an increase in the maximum punishment. 536 U.S. at 589, 122 S.Ct. 2428. Hurst recognizes that our precedent has repeatedly held that *Ring* does not require the jury to make specific findings of the aggravators or to make a unanimous jury recommendation as to sentence, and he asks us to revisit our

---

[4] Hurst's counsel asked for an interrogatory verdict to specify the aggravators found and the votes on each. The motion was denied.

precedent on the issue in the decisions in *Bottoson v. Moore*, 833 So.2d 693 (Fla. 2002), and *King v. Moore*, 831 So.2d 143 (Fla.2002). In the plurality decisions in both cases, we rejected claims that *Ring* applied to Florida's capital sentencing scheme. We decline to revisit those decisions in this case.

Hurst contends that the facts of this case support a conclusion that *Ring* applies to require the jury to expressly find one or more aggravators and to issue its recommendation based on a unanimous advisory verdict. He contends that this case is distinguishable from cases where a jury has unanimously found an aggravating factor such as conviction of a prior violent felony or that the murder was committed in the course of committing, attempting to commit, or flight after commission of a separate enumerated felony. See § 921.141(5)(b), (d), Fla. Stat. (2012). There is no prior violent felony aggravator in this case, nor did this jury convict Hurst of a contemporaneous felony such as robbery. However, we have rejected the *Ring* claim in similarly situated cases.

We previously rejected the invitation to revisit our decisions in *Bottoson* and *King* in *Peterson v. State*, 94 So.3d 514 (Fla.), *cert. denied*, — U.S. —, 133 S.Ct. 793, 184 L.Ed.2d 586 (2012), a case which also did not involve conviction for a prior violent felony or a contemporaneous enumerated felony, and did not involve a unanimous jury advisory verdict. There, the majority stated, "We have consistently rejected claims that Florida's death penalty statute is unconstitutional." *Id.* at 538 (citing *Baker v. State*, 71 So.3d 802, 823-24 (Fla.2011), *cert. denied*, — U.S. —, 132 S.Ct. 1639, 182 L.Ed.2d 238 (2012); *Darling v. State*, 966 So.2d 366, 387 (Fla.2007); *Frances v. State*, 970 So.2d 806, 822 (Fla. 2007)). Similarly, in *Butler v. State*, 842 So.2d 817, 834

(Fla.2003), this Court rejected the *Ring* claim where there was no aggravating factor based on a prior violent felony conviction and there was no unanimous jury advisory sentence. *See also Ault v. State*, 53 So.3d 175, 206 (Fla.2010) ("[T]his Court has repeatedly and continually rejected such claims" that the advisory verdict must be unanimous); *Coday v. State*, 946 So.2d 988, 1006 (Fla.2006) (reiterating that it is not unconstitutional for a jury to be allowed to recommend death by a simple majority vote). We continue to adhere to this same body of precedent.

We also note that the Eleventh Circuit Court of Appeals in *Evans v. Secretary, Fla. Dep't of Corrections*, 699 F.3d 1249 (11th Cir.2012), *cert. denied, Evans v. Crews*, — U.S. —, 133 S.Ct. 2393, 185 L.Ed.2d 1105 (2013), reversed a federal district court's ruling that Florida's sentencing scheme violates *Ring*. The Eleventh Circuit noted that the United States Supreme Court's "last word in a Florida capital case on the constitutionality of that state's death sentencing procedures" came in *Hildwin v. Florida*, 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989), which predated *Ring*. *Evans*, 699 F.3d at 1258. This Court, in *Hildwin v. State*, rejected the claim that the sentencing scheme was unconstitutional because the jury is not required to make specific findings authorizing the imposition of the death penalty. 531 So.2d 124, 129 (Fla.1988). On review, the United States Supreme Court affirmed our decision in *Hildwin* and stated, "[T]he Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." *Hildwin*, 490 U.S. at 640-41, 109 S.Ct. 2055. As the Eleventh Circuit noted in *Evans*, the United States Supreme Court has never expressly overruled *Hildwin*, and did not do so in *Ring*. The *Ev-*

ans court also agreed with the State that Florida's sentencing procedures do provide for jury input about the existence of aggravating factors prior to sentencing—a process that was completely lacking in the Arizona statute struck down in *Ring*. *Evans*, 699 F.3d at 1261. For all these reasons, we reject Hurst's claim that Florida's capital sentencing scheme is unconstitutional under *Ring*.

C. Proportionality

Hurst next contends that the death sentence in this case is not proportional because it is not one of the most aggravated and least mitigated of first-degree murders, thus requiring that his death sentence be reduced to life in prison. He contends that a life sentence should be imposed based on evidence of abnormalities in his brain due to fetal alcohol syndrome, his low mental functioning, and other mental and background mitigation. In performing the proportionality review, this Court has explained:

> "[W]e make a comprehensive analysis in order to determine whether the crime falls within the category of both the most aggravated and the least mitigated of murders, thereby assuring uniformity in the application of the sentence." We consider the totality of the circumstances of the case and compare the case to other capital cases. This entails "a *qualitative* review by this Court of the underlying basis for each aggravator and mitigator rather than a quantitative analysis." In other words, proportionality review "is not a comparison between the number of aggravating and mitigating circumstances."

Williams v. State, 37 So.3d 187, 205 (Fla. 2010) (quoting *Offord v. State*, 959 So.2d 187, 191 (Fla.2007) (citations

omitted)). This Court has long recognized an obligation to perform a proportionality re-view.[5] *See, e.g., Lamadline v. State*, 303 So.2d 17, 20 (Fla.1974).

In reviewing proportionality, this Court follows precedent that requires that the death penalty be "reserved only for those cases where the most aggravating and least mitigating circumstances exist." *Terry v. State*, 668 So.2d 954, 965 (Fla.1996). In doing so, we "will not disturb the sentencing judge's determination as to 'the relative weight to give to each established mitigator' where that ruling is 'supported by competent, substantial evidence in the record.' " *Blackwood v. State*, 777 So.2d 399, 412-13 (Fla.2000) (quoting *Spencer v. State*, 691 So.2d 1062, 1064 (Fla.1996)). We "review the weight the trial court ascribes to mitigating factors under the abuse of discretion standard." *Smith v. State*, 998 So.2d 516, 527 (Fla. 2008). The Court will also "affirm the weight given an aggravator if based on competent substantial evidence." *Blake v. State*, 972 So.2d 839, 846 (Fla.2007). "The weight to be given aggravating factors is within the discretion of the trial court, and it is subject to the abuse of discretion standard." *Buzia v. State*, 926 So.2d 1203, 1216 (Fla.2006).

Hurst contends, inter alia, that his case is similar to *Cooper v. State*, 739 So.2d 82, 86 (Fla.1999), in which the Court vacated the death sentence and imposed a life sentence on the basis of lack of proportionality when compared to other capital cases. In *Cooper*, the evidence showed the defendant was eighteen years old at

---

[5] Rule 9.142(a)(5), Florida Rule of Appellate Procedure, provides that "[i]n death penalty cases, whether or not insufficiency of the evidence or proportionality is an issue presented for review, the court shall review these issues and, if necessary, remand for the appropriate relief."

the time of the crime. Cooper also suffered from borderline mental retardation, brain damage likely caused by beatings and head trauma as a child, a history of seizures, schizophrenia, cognitive brain impairment, and an abusive childhood including being repeatedly threatened with a gun by his father. The trial court in *Cooper* found three aggravators and two statutory mitigators, as well as other nonstatutory mitigation. We conclude that although there was more aggravation in *Cooper*, there was also more mitigation than is present in this case. *Cooper* does not require us to find Hurst's sentence disproportionate.

The State relies on *Jeffries v. State*, 797 So.2d 573 (Fla.2001), as a basis on which to find the sentence in this case proportional. In *Jeffries*, the murder occurred in a somewhat similar manner to the instant case— the victim was stabbed, suffering multiple sharp force injuries, and was beaten. *Id.* at 575. The trial court found two aggravators, murder in course of commission of a robbery and HAC. *Id.* at 576. The mitigation included findings that the defendant's capacity to appreciate the criminality of his conduct was impaired, that the codefendant was equally culpable and received a plea deal for a twenty-year sentence, and that Jeffries had a long history of emotional and mental problems, as well as drug and alcohol abuse. We held that the death sentence in *Jeffries* was proportional when compared to other capital cases. *Id.* at 583.

More recently, in *Allen v. State*, 137 So.3d 946, (Fla.2013), we found the death sentence proportionate. The victim was bound and had chemicals poured on her face. Allen beat the victim with belts, put a belt around her neck and, in spite of her pleas to stop, strangled her. The autopsy also revealed facial bruising, bruising on the torso, hand, thigh, knee, and shoulder; and the vic-

tim had contusions on her hands, face, and torso. Her hands showed ligature marks from having been tied, and her neck showed signs of ligature. *Id.* at 951-53.

The trial court in *Allen* found two aggravators—commission of the murder in the course of committing or attempting to commit a kidnapping, and that the murder was especially heinous, atrocious, or cruel. *Id.* at 954-55. The nonstatutory mitigation found by the court included that Allen had been the victim of physical and possibly sexual abuse, had brain damage due to numerous prior head injuries resulting in lack of impulse control, suffered a poor childhood environment, and exhibited helpfulness. The evidence also showed that Allen had significant organic brain damage and intracranial injuries, and was at the lower end of intellectual capacity. Testimony was received that a PET scan revealed at least ten brain injuries, mostly to the right side of Allen's brain which would affect impulse control, judgment, and mood, and would make it hard for her to conform her conduct to the requirements of society. We found the death sentence in *Allen* proportionate when compared to sentences in other capital cases. *Id.* at 968-69.

Similarly, in *Rogers v. State*, 783 So.2d 980 (Fla.2001), the victim was murdered by being brutally stabbed, and had bruises, abrasions, and a shallow defensive wound to her arm. *Id.* at 986. The trial court found two aggravators—that the murder was committed for pecuniary gain and that it was especially heinous, atrocious, or cruel. *Id.* at 987. The court found one statutory mitigator—that the defendant's capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of law was substantially impaired. *Id.* This last mitigating factor was based on the trial court's finding that Rogers suffers from

psychosis and brain dam age that may have been exacerbated by long-term alcohol abuse. *Id.* at 996. The trial court found other mitigation in Rogers' difficult family background, abusive childhood, and his exhibition of good qualities as a father and employee. *Id.* We upheld the death sentence in *Rogers* as proportionate.

Based on the forgoing, we find that Hurst's death sentence, when compared to the death sentences in other comparable capital cases, is proportionate.

CONCLUSION

For the reasons expressed above, we affirm Hurst's sentence of death for the first-degree murder of Cynthia Harrison.

It is so ordered.

POLSTON, C.J., and LEWIS, QUINCE, and CANADY, JJ., concur.

PARIENTE, J., concurs in part and dissents in part with an opinion, in which LABARGA and PERRY, JJ., concur.

PARIENTE, J., concurring in part and dissenting in part.

I concur in the majority's conclusion that the trial court did not abuse its discretion in denying Hurst a successive mental retardation hearing pursuant to Florida Rule of Criminal Procedure 3.203 prior to the new sentencing proceeding. I dissent, however, from the majority's affirmance of Hurst's sentence of death because there was no unanimous jury finding of either of the two aggravating circumstances found by the trial judge—that the murder was heinous, atrocious, or cruel; and that the murder was committed in the course of a robbery.

No jury ever convicted Hurst of the contemporaneous robbery, so this case does not fall within the exception to the constitutional requirement of juror unanimity for a contemporaneous felony conviction or a prior violent felony conviction as an aggravating circumstance, which automatically demonstrate that the jury has made the necessary findings to warrant the possibility of a death sentence. *See Johnson v. State*, 969 So.2d 938, 961 (Fla. 2007) (rejecting a challenge to the constitutionality of the defendant's death sentence because the "murder in the course of a felony aggravator" was premised on separate convictions, "which satisfies Sixth Amendment requirements").

In Hurst's case, the jury recommended death by the slimmest margin permitted under Florida law—a bare majority seven-to-five vote. Because a penalty-phase jury in Florida is not required to make specific factual findings as to the aggravating circumstances necessary to impose the death penalty pursuant to Florida's capital sentencing statute, it is actually possible that there was not even a majority of jurors who agreed that the same aggravator applied. *See Peterson v. State*, 94 So.3d 514, 540 (Fla.2012) (Pariente, J., concurring as to conviction and dissenting as to sentence). In my view, Hurst's death sentence cannot be constitutionally imposed, consistent with the United States Supreme Court's decision in *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), and Florida's right to trial by jury, in the absence of a unanimous finding by the jury that any of the applicable aggravators apply, which is not present here.

I have previously expressed my view that "[t]he absence of a requirement of a unanimous jury finding as a precondition to a sentence of death is ... a matter of constitutional significance." *Butler v. State*, 842 So.2d

817, 838 (Fla.2003) (Pariente, J., concurring in part and dissenting in part). Indeed, I continue to believe that, in light of *Ring*, Florida's death penalty statute, as applied in circumstances like those presented in this case where there is no unanimous jury finding as to any of the aggravating circumstances, is unconstitutional. *See Peterson*, 94 So.3d at 538 (Pariente, J., concurring as to conviction and dissenting as to sentence).

As I stated in my opinion dissenting as to the affirmance of the death sentence in *Peterson*:

> Under our current sentencing scheme, not all defendants who are convicted of first-degree murder are eligible for a sentence of death. The trial judge must make additional findings before the death penalty can be imposed. *See generally* § 775.082, Fla. Stat. (2011). Without these findings, a trial court cannot impose a higher sentence than life imprisonment on the basis of the verdict alone. *See* § 775.082(1), Fla. Stat. (stating that without findings by the court that a defendant "shall be punished by death, ... such person shall be punished by life imprisonment"). It is only after a sentencing hearing and additional findings of fact regarding aggravators and mitigators that the sentence of death may be imposed. Not only is this requirement imposed by Florida law, but it is constitutionally mandated by the Eighth Amendment to prevent death sentences from being arbitrarily imposed.
>
> In addition, as interpreted by the United States Supreme Court in *Ring*, the Sixth Amendment requires that a jury find those aggravating factors. As Justice Scalia explained

> in his concurring opinion in *Ring*, the bottom line is that "the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives—whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—must be found by a jury." *Ring*, 536 U.S. at 610, 122 S.Ct. 2428 (Scalia, J., concurring).

Id. at 538-39.

"Apart from capital sentencing, the requirement of unanimity has been scrupulously honored in the criminal law of this state for any finding of guilt and for any fact that increases the maximum punishment." *Butler*, 842 So.2d at 837 (Pariente, J., concurring in part and dissenting in part). "Florida's exclusion of the death penalty from the requirement of jury unanimity cannot be reconciled" with the Supreme Court's holdings in *Ring* that "[t]he right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death," and that "the Sixth Amendment applies to both." *Peterson*, 94 So.3d at 539 (Pariente, J., concurring as to conviction and dissenting as to sentence) (quoting *Ring*, 536 U.S. at 609, 122 S.Ct. 2428) (emphasis omitted).

It remains my view that *Ring* requires any fact that qualifies a capital defendant for a sentence of death to be found by a jury, and that Florida's state constitutional right to trial by jury, which is embodied in article I, section 22, of the Florida Constitution, "requires a unanimous jury finding beyond a reasonable doubt on the existence of any element necessary to increase an author-

ized punishment, most especially the ultimate punishment of the death penalty." *Butler*, 842 So.2d at 838 (Pariente, J., concurring in part and dissenting in part); *see also Coday v. State*, 946 So.2d 988, 1022 (Fla.2006) (Pariente, J., concurring in part and dissenting in part). In other words, article I, section 22, is violated in the rare case where the death penalty is imposed without any of the aggravators that automatically demonstrate that a jury has made the necessary findings to warrant the possibility of a death sentence, such as a prior violent felony conviction or that the murder occurred while in the course of an enumerated felony that was also found by a jury. This is one of those rare cases.

This case also illustrates how the use of a special verdict form would help solve the problem, as Hurst's counsel requested an interrogatory verdict to specify the aggravators found by the jury and the votes on each, but the motion was denied in accordance with this Court's case law preventing the use of penalty-phase special verdict forms detailing the jurors' determination concerning aggravating factors. *See State v. Steele*, 921 So.2d 538, 545 (Fla.2005). Had the jury been permitted to specify its findings, it is possible that this Court would have evidence in the record that Hurst's jury unanimously found the existence of one of the aggravators found by the trial judge in imposing the death sentence, thereby curing the constitutional infirmity in this case. Because the jury was not permitted to indicate its findings, however, this evidence does not appear in our record.

I have previously expressed my view as to the "difficulties created" by this Court's decisions that fail to allow or mandate the use of special interrogatories in death penalty cases to permit the jury to make special findings as to the aggravators. *Aguirre-Jarquin v.*

State, 9 So.3d 593, 610 (Fla.2009) (Pariente, J., specially concurring). I once again renew this position here, as the use of a special verdict form during the penalty phase would enable this Court "to tell when a jury has unanimously found a death-qualifying aggravating circumstance, which would both facilitate our proportionality review and satisfy the constitutional guarantee of trial by jury even when the recommendation of death is less than unanimous." *Coday*, 946 So.2d at 1024 (Pariente, J., concurring in part and dissenting in part).

Finally, I also take this opportunity to note an evolving concern as to the possible Eighth Amendment implications of Florida's outlier status, among those decreasing number of states that still retain the death penalty, on the issue of jury unanimity in death penalty cases.[6] Except for Florida, every state that imposes the death penalty, as well as the federal system, requires a unanimous jury verdict as to the finding of an aggravating circumstance.[7] This means that in *no other*

---

[6] Since *Ring* was decided in 2002, six states— Connecticut, Illinois, Maryland, New Jersey, New Mexico, and New York—have abolished the death penalty.

[7] In *Steele*, 921 So.2d at 548-49, this Court explained that, aside from Florida, only Utah and Virginia did not at that time require a unanimous jury finding of aggravators. Subsequent state supreme court decisions in those two states have concluded that a unanimous jury finding of an aggravating circumstance is required. *See Prieto v. Commonwealth*, 278 Va. 366, 682 S.E.2d 910, 935 (2009) ("[W]e hold that in the penalty phase of capital murder trials the death penalty may not be imposed unless the jury unanimously finds either one or both of the aggravating factors of 'vileness' or 'future dangerousness' beyond a reasonable doubt."); *Archuleta v. Galetka*, 267 P.3d 232, 259 (Utah 2011) ("In Utah, the fact finder in the guilt phase must find—unanimously and beyond a reasonable doubt—the statutory aggravator that makes death a possible sentence.").

state or federal court in the country would Hurst have been sentenced to death in this case in the absence of a unanimous jury finding of an aggravating circumstance. Florida is a clear outlier.[8]

In *Steele*, 921 So.2d at 548-49, this Court urged the Legislature to reexamine Florida's capital sentencing statute in light of *Ring* and Florida's outlier status. I have also previously echoed this suggestion, encouraging the Legislature to bring Florida "closer to the mainstream of capital sentencing states in regard to jury findings." *Coday*, 946 So.2d at 1025 (Pariente, J., concurring in part and dissenting in part).

Although those calls for legislative action have arisen primarily due to *Ring* and Sixth Amendment concerns, the Eighth Amendment ramifications of Florida's outlier status are also clear. For example, two Justices on the United States Supreme Court have recently expressed "deep concerns" about the federal constitutionality of Alabama's death penalty statute in light of its outlier status on the issue of jury overrides. *See Woodward v. Alabama*, — U.S. — 134 S.Ct. 405, 405, 187 L.Ed.2d 449 (2013) (Sotomayor, J., with whom Justice Breyer joins as to Parts I and II, dissenting from denial of certiorari).

The United States Supreme Court has repeatedly explained that "death is different" from every other form of punishment. *See, e.g.*, *Ring*, 536 U.S. at 605-06, 122 S.Ct. 2428; *Harmelin v. Michigan*, 501 U.S. 957, 994, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991); *Gardner v.*

---

[8] In addition to Florida's outlier status as the only state in the country that allows the death penalty to be imposed without a unanimous jury finding of an aggravating circumstance, Florida is also one of the only states to permit the jury to recommend death by a less than unanimous vote.

Florida, 430 U.S. 349, 357, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977). The Supreme Court has also emphasized the "heightened reliability demanded by the Eighth Amendment in the determination whether the death penalty is appropriate in a particular case." *Sumner v. Shuman*, 483 U.S. 66, 72, 107 S.Ct. 2716, 97 L.Ed.2d 56 (1987). As this Court has pointed out, "[m]any courts and scholars have recognized the value of unanimous verdicts," particularly given that the "reliability" of death sentences "depends on adhering to guided procedures that promote a reasoned judgment by the trier of fact." *Steele*, 921 So.2d at 549 (quoting *State v. Daniels*, 207 Conn. 374, 542 A.2d 306, 315 (1988)).

While questions of public policy regarding Florida's capital sentencing statute are left to the Legislature, the Sixth and Eighth Amendment implications of Florida's outlier status on the lack of jury unanimity, which threaten to unravel our entire death penalty scheme, should be of serious concern. I once again urge the Legislature, as has former Justice Cantero, to revisit this issue in Florida's capital sentencing scheme.

For all these reasons, I dissent from the majority's affirmance of Hurst's death sentence because there is no unanimous finding by the jury that any of the applicable aggravators apply. The absence of juror unanimity in the fact-finding necessary to impose the death penalty remains, in my view, an independent violation of Florida's constitutional right to trial by jury.

SUPREME COURT OF FLORIDA

TIMOTHY LEE HURST,
Appellant.

vs.

STATE OF FLORIDA,
Appellee.

THURSDAY, SEPTEMBER 4, 2014
CASE NO.: SC12-1947
Lower Tribunal No(s).: 1998-CF-001795-A

Appellant's Motion for Rehearing is hereby denied.

LABARGA, C.J., and PARIENTE, LEWIS, QUINCE, CANADY, POLSTON, and PERRY, JJ., concur.

A True Copy
Test:

/s/ John A. Tomasino [Court Seal]
John A. Tomasino
Clerk, Supreme Court

tw
Served:

WILLIAM CARL MCLAIN
STEPHEN RICHARD WHITE
HON. PAM CHILDERS, CLERK
HON. LINDA LEE NOBLES, JUDGE
JOHN A. MOLCHAN

No. 14-7505

IN THE

Supreme Court of the United States

SUPREME COURT, U.S.
FILED
MAY 28 2015
OFFICE OF THE CLERK

TIMOTHY LEE HURST,
Petitioner,

v.

FLORIDA,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

JOINT APPENDIX
VOLUME II OF III (JA 323–JA 646)

PAMELA JO BONDI
ATTORNEY GENERAL OF FLORIDA
ALLEN WINSOR
SOLICITOR GENERAL
CAROLYN M. SNURKOWSKI
ASSOCIATE DEPUTY ATTORNEY GENERAL
Counsel of Record
OFFICE OF THE ATTORNEY GENERAL
PL-01, The Capitol
Tallahassee, FL 32399-1050
(850) 414-3300
carolyn.snurkowski@myfloridalegal.com

Counsel for Respondent

SETH P. WAXMAN
Counsel of Record
CATHERINE M.A. CARROLL
DAVID M. LEHN
FRANCESCO VALENTINI
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
seth.waxman@wilmerhale.com

Counsel for Petitioner

ADDITIONAL COUNSEL LISTED ON INSIDE COVER

PETITION FOR CERTIORARI FILED DECEMBER 8, 2014
CERTIORARI GRANTED MARCH 9, 2015

NANCY A. DANIELS
PUBLIC DEFENDER
DAVID A. DAVIS
ASSISTANT PUBLIC
DEFENDER
Leon County Courthouse
301 South Monroe Street
Suite 401
Tallahassee, FL 32301

MARK E. OLIVE
LAW OFFICES OF
MARK E. OLIVE, P.A.
320 West Jefferson Street
Tallahassee, FL 32301

Counsel for Petitioner

ERIC F. FLETCHER
ALLISON TRZOP
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109

TABLE OF CONTENTS

VOLUME I

Page

Docket Listing excerpts for the Supreme Court of Florida, Case No. SC12-1947 1

Docket Listing excerpts for the Supreme Court of Florida, Case No. SC12-345 5

Docket Listing excerpts for the Supreme Court of Florida, Case No. SC07-1798 8

Docket Listing excerpts for the Supreme Court of Florida, Case No. SC00-1042 11

Docket Listing excerpts for the Circuit Court of the First Judicial Circuit in and for Escambia County, Florida, Case No. 1998 CF 001795 A 14

Opinion of the Supreme Court of Florida, dated April 18, 2002 27

Florida Circuit Court Order Denying Defendant's Motion to Vacate Judgment of Conviction and Sentence, dated August 23, 2007 53

Opinion of the Supreme Court of Florida, dated September 17, 2009 127

Florida Circuit Court Order Denying Motion for Evidentiary Hearing for Determination of Mental Retardation of the Defendant, dated February 23, 2012, with Attachment #1 (excerpts of Order Denying Defendant's Motion to Vacate Judgment of Conviction and Sentence, dated August 23, 2007) 193

Jury Instructions, filed March 9, 2012 207

TABLE OF CONTENTS—Continued

Page

Jury Verdict, filed March 9, 2012 217

Transcript of *Spencer* Hearing, dated April 4, 2012 218

State's Memorandum of Law in Support of the Jury's Recommendation of Death, filed April 23, 2012 230

Defendant's Sentencing Memorandum in Support of Life, filed June 28, 2012 238

Sentencing Order, dated August 16, 2012 258

Florida Circuit Court Judgment and Sentence, dated August 16, 2012 272

Opinion of the Supreme Court of Florida, dated May 1, 2014 289

Supreme Court of Florida Order Denying Motion for Rehearing, dated September 4, 2014 322

VOLUME II

Transcript of Resentencing Hearing
Volume I, March 5, 2012 323
Volume II, March 6, 2012 478

VOLUME III

Transcript of Resentencing Hearing (continued)
Volume III, March 6-7, 2012 647
Volume IV, March 7-8, 2012 789
Volume V, March 9, 2012 956

IN THE CIRCUIT COURT
IN AND FOR ESCAMBIA COUNTY, FLORIDA

STATE OF FLORIDA,

vs.

TIMOTHY HURST,
Defendant

CASE NO: 1998-CF-001795

RESENTENCING HEARING
TRANSCRIPT OF PROCEEDINGS

VOLUME I

---

* * *

[6] (Proceedings held 3/5/12)

MR. MOLCHAN: State of Florida versus Timothy Hurst. Case 98-001795. John Molchan on behalf of the State.

MR. DOSS: John Doss on behalf of Mr. Hurst, Your Honor.

Your Honor, we're here this morning — I think you had seen the e-mail that whenever your assistant had sent asking whether we were ready or not. I'm ready but for one witness, Dr. Woo, that did the PET scan last Monday. Dr. Woo is critical in the sense that he tells me that he found frontal lobe damage to Mr. Hurst.

Dr. Woo tells me that he's scheduled for a certification seminar for the entire week in Orlando.

I have been talking to this man for weeks, and he hasn't told me this. And I don't know if he just misunderstood when I said it was going to happen or what. But he's not available this week because he tells me he's got to be there or he doesn't get credit for the seminar, thus it will put his certification in jeopardy.

I have talked through some alternatives to him. I didn't know what Your Honor's position would be on it, so I haven't tried to lock anything in in the [7] sense of acting on any of the proposals that I had.

I was — he is scheduled to testify in another penalty phase at 2 p.m. in Stuart on Monday.

Knowing that he was in Orlando, I had done this once before on a capital case where we presented video testimony of an expert. I know that the Orlando Courthouse has that capability because that's where I did it. I did it in front of Judge Perry under warrant on David Johnson's case. I didn't know if that was something — not knowing Your Honor's schedule, I don't know if that's something you would entertain or not.

If that's not an option, then I would be asking for a continuance this morning because I think this frontal lobe damage is critical coupled with the mental retardation, the intellectual functioning type of defense that I would intend on presenting here at the penalty phase.

I throw that out there, one, to try to work something out so that we can go now knowing that we've all worked real hard to get here but also knowing that I really think that Dr. Woo is critical for my presentation as far as the brain damage that he's found with Mr. Hurst in that PET scan that we conducted.

MR. MOLCHAN: Judge, my position is that — I floated an alternative to Mr. Doss concerning [8] poten-

tially video. We just stay late one night and we video Dr. Woo, and we then have it ready to go and present this testimony to the jury.

However, I understand from Mr. Doss I don't think that's a possibility because evidently the seminar is until 8:00 or something like that.

MR. DOSS: That's my understanding is 8 a.m. to 8t p.m. is what he told me, Judge.

THE COURT: You're kidding me?

MR. DOSS: No, I'm not kidding you. I had thought the same thing as Mr. Molchan originally thinking, okay, the fellow finishes at 5:00. We can work through his testimony, present it the next day.

He tells me — and I've talked to him a couple of times on it being upset and distressed at the fact that I've learned this now trying to think of alternatives to come in and present to the Court. So I don't — my hands are a little bit tied on that.

Because I had thought, well, maybe we could do it at lunch, but I don't think we can get through that kind of testimony in an hour.

THE COURT: All right. First of all, I'm going to want the information regarding that seminar because I'm going to absolutely going to check that out because I would be absolutely amazed if there was a [9] seminar that went for — how many days is this supposed to be?

MR. DOSS: He told me it started on March 3rd and it was till the following Saturday. I think it's from Saturday to Saturday, if I remember correctly. I don't have my computer —

THE COURT: So 8t a.m. to 8 p.m.?

MR. DOSS: I don't have any computer here to look at the e-mail, but I'm pretty sure it's the 3rd to either the 10th or 11th, Judge. It's to the weekend because I had thought of that as well, you know. And I can certainly e-mail him and contact him, you know, to send me that via e-mail and provide it to the Court.

As Your Honor knows, he's in Irvine, California. They are a couple of hours behind us. I don't know that he's in just yet. It's 8:45 here, so I'm assuming it's 6:45 there.

THE COURT: I'm confused. Didn't you say he was in Orlando?

MR. DOSS: Oh, that's right. He's in Orlando now. I'm sorry. You're right. He should be in Orlando, and he should be in the seminar.

THE COURT: All right.

MR. MOLCHAN: I did some research, Judge, on the PET scan and its analysis with respect to it as a [10] mitigating factor. I found a couple of cases, Rogers v. State, 783 So.2d 980 — 780 So.2d 980. And I believe Rogers stands for the proposition that basically a defendant is not entitled to a PET scan under the circumstances of that.

And I will say that there was ample evidence — and this is really a 2001 decision —

THE COURT: I'm sorry. What's the style again?

MR. MOLCHAN: This is Rogers v. State, Judge.

THE COURT: What is the —

MR. DOSS: 783 So.2d 980. It's a 2001 decision which basically said the defendant is not entitled to a PET scan.

However, that was encompassed with a — an amount of expert testimony in which the evidence of neurological damage, I believe, really wasn't from what I could tell was basically identified. I just got the case. My printer wasn't working, but that case talked about the PET scan.

Another case is Stewart vs. State, 37 So.3d 243. That's 37 So.3d 243. Basically in Stewart v. State is they basically said it was not ineffective by not obtaining a PET scan analysis, and there was a great deal of discussion about that.

[11] In this case, there were other available experts for the defense that basically spoke to the issue that was at the original penalty phase. And so in analyzing the attorneys' ineffective necessary or lack of effectiveness, there said there was still ample evidence presented to the jury and did not find it as ineffective, and that's a 2010 decision.

However, there is also Hoskins v. State, which I think is a little more concerning. It's a 1997 case. It's 702 So.2d 202, 702 So.2d 202. In this case — in fact it has Dr. Krop's name in it. Dr. Krop was the expert in this case who advised the Court that it needed — or it wanted a PET scan to be done on — which is basically similar in this situation. Dr. Krop has done some checking on Mr. Hurst and had indicated that he wanted the PET scan done, which Your Honor ordered.

And basically what — in a post-conviction setting, this Dr. Krop indicated that the PET scan and I'll quote, It would certainly — this is from Dr. Krop's testimony — rendering — he would give me an opportunity to render an opinion with regard to neurological status of this — of Mr. Hoskins to a more definitive level

than I was able to previously or that I can with the current data that I have available.

[12] The Court denied the Defense's request for a PET scan, and the Court, in reviewing that, indicated that they should have ordered the testing in that situation.

So I wanted to kind of put the good with the bad as far as that's concerned. So that's where those cases stand.

In this case, as I understand it, we have two experts, that being two doctors, Dr. Krop and another doctor from Central Florida, who will testify and say that Mr. Hurst has diminished levels close to mental retardation, a 71 or 70 level and possibly below.

Additionally, the State has Dr. McClaren, who his going to basically — his testing is at 78, although there were some problems with Dr. McClaren's testing that puts him at 78.

I looked at Dr. Woo's report that was provided to me, and it indicated frontal lobe damage, which we didn't have when we were taking Dr. Krop's testimony. So I'm not sure — I can't speak to that portion of it.

However, from the standpoint of what the case is going to present, I don't think there's going to be a dispute that Mr. Hurst certainly has problems from an intellectual standpoint.

THE COURT: Okay. I'm still not sure where [13] this leaves us.

MR. MOLCHAN: I don't know, Judge.

THE COURT: Because at least — I clearly have not read the Rogers, Stewart or Hoskins case. But at

least the first two were whether they were entitled to one. Well whether he was entitled to it or not, he got it.

MR. MOLCHAN: Uh-huh.

THE COURT: So I think the first two, I'm not sure that they impact this decision at all because now we've got it and now it's — apparently the results are favorable to the defense.

MR. MOLCHAN: I have Hoskins, Judge, if you want it.

MR. DOSS: That's true, Judge. Just to kind of fill in a few of the blanks there is that Dr. Krop had received soft signs of some kind of brain damage whenever he did a neuro psych.

As you'll remember from the post-conviction, Dr. McClain testified regarding the same thing linking it as well to the fetal alcohol syndrome that she believed that Tim Hurst suffered from. Then this PET scan, what it allows us to do is go from just some soft general signs of not knowing where that brain damage is so that we can determine exactly how it is that it [14] affects Mr. Hurst's functioning. Whenever we put it in that specific area of the brain, then the experts are able to tell us, look, this is what the brain controls, this is how it's going to manifest itself through Mr. Hurst's behavior. And that's where — I think that's where it goes beyond where someone like Dr. Krop can provide and why I personally believe that it's critical to the Defense to be able to put that out there.

THE COURT: All right. Let me stop again. Because, of course, I'm being hit fairly cold with this. But is not — and I don't know what the State agrees to or doesn't agree to. But can Dr. Krop not use that information to testify? I mean, why can't he take — if the

State is agreeable, why can't he take Dr. Woo's information and extrapolate it into his opinion?

MR. DOSS: I think that he can in the sense that there's frontal lobe damage. He doesn't have the expertise of Dr. Woo nor the — I've used Dr. Woo before, and I know he has slides and it was part of the reason I wanted to use him. His computer program really narrows in on the area of the brain where we can show what a brain is supposed to do and we can show what Mr. Hurst's brain was doing during the PET scan [15] last Monday to say, look, here it is, this is what the brain does in that area, and this is a demonstration of that brain damage in fact.

THE COURT: Okay. And let me stop you again. Because I know you said you thought maybe you could do it over lunch, but if would be a little — not long enough. But the State is going to take two days. You can't do it today lunch and perhaps tomorrow lunch? You don't think over a two-hour period of time you could get this done?

MR. DOSS: Obviously I haven't contemplated that, Judge. That didn't strike me. I haven't spoken to Dr. Woo nor have I tried to put anything into place as far as the video.

THE COURT: Mr. Doss, let me tell you, as you knew, I would be most unhappy because I've still got a one-week — a two-week RICO trial. I've got a two-week arson case. I've got a five co-defendant case I've got to get done. I have now got two first degree murders on my plate since the last time we spoke. So I have to get these cases going.

And I know that you said you just got caught off guard with this. But, I mean, I had this on the Novem-

ber docket for a definitive go; it didn't. I put it on the January docket for a definitive go; it [16] didn't. I now put it on the March go, and now — I want to explore every possible way.

So if you need me to take a break so you can go talk to Dr. Woo, I'll be more than happy to do so because everybody else is going to depend upon what goes with Mr. Hurst.

Because, I mean, I've got a roomful of people that I can probably fill up the week, but I want to get Mr. Hurst. I want to get this case done; I want to get this case resolved.

MR. DOSS: Just so Your Honor knows, that's why I've tried to explore it. I'm not pleased about it either as far as getting ready for trial and coming over and shutting down my practice to come over here. Believe me.

THE COURT: I understand.

MR. DOSS: I would just as soon get this done myself. But I have no problem going and trying to call Dr. Woo and e-mailing him as well. Like I said, I know he's in the seminar, so I'm going to do my best to get ahold of him right now.

THE COURT: Also, I really would like that seminar information.

MR. DOSS: I understand.

THE COURT: Because, I mean, it is — perhaps [17] it is true, but I find it incredible that you would have a 12-hour seminar for five consecutive days.

MR. DOSS: It's certainly not similar to our legal seminars.

THE COURT: No, nothing that I've ever attended.

So if you want to take maybe a 15, 20 minute break and see if you can go get him. Because that might resolve it. Do you have any difficulty with that?

MR. MOLCHAN: Judge, quite frankly, I wasn't even going to take Dr. Woo's deposition. Quite Frankly, I was going to go forward without leave to do that because I felt that I was going — so anything that Mr. Doss can come up with, I'm ready and willing to work with him on that.

THE COURT: All right. You want to take a few minutes and see if you can go get him?

MR. DOSS: Most certainly.

THE COURT: And while I understand — I'm not trying to dump on you, Mr. Doss, but you can relay to Dr. Woo that I am really —

MR. DOSS: I already have, Judge. I wasn't very pleased about having to come before Your Honor and say that this morning.

[18] THE COURT: I understand.

MR. DOSS: I can assure you of that. I'll step outside and I'll let the Court know.

THE COURT: All right.

(Proceedings held not related to the defendant)

MR. MOLCHAN: You want a Hurst update, Your Honor?

THE COURT: Well, it's making me sad because if you two had sent word that you were in conducting a deposition, I would have been thrilled.

MR. DOSS: We're not conducting a depo, Judge, but I got good news and bad news.

THE COURT: Oh.

MR. DOSS: I'll start with the good news.

THE COURT: You could've stopped at the end of the good news.

MR. DOSS: Judge, I haven't been able to give you a lot of good news, so I'm going to start with that.

I spoke to Dr. Woo. As soon as he broke, I called him at five after and was able to speak to him. He said that the conference is not scheduled till eight, it's scheduled till five and he can be available at any point this week that Your Honor tells him. And [19] if it was better for the Court, he would try to do it during lunch. But, you know, their 5 o'clock is our 4 o'clock.

Now the bad news. The bad news is Ms. Molchan's secretary, Ms. Anderson, and I went up to the IT people to speak to them about being able to get this done. They didn't seem to think that they could get it done this week.

THE COURT: Oh, they can't get it done this week.

MR. DOSS: Well I thought they might have a different answer for you, Judge, than they did for me.

THE COURT: They'll get it done this week.

MR. DOSS: So contingent on that, whenever we tell Dr. Woo to be whenever we need him to be, then he's going to be there. I would suggest that if we're going to do it, Thursday would be fine.

I think we're going to be on Mr. Hurst's side of the case probably at that point, and that that would be a safe point to do it.

THE COURT: I imagine that I will be breaking probably within the next probably 15, 20 minutes, and I will assure you gentlemen that I will make my way immediately to the fifth floor and I'll have an answer for you directly if you could still hang out.

[20] MR. DOSS: I'll be wherever you tell me to be, Judge.

THE COURT: Thank you. Thank you for trying very hard.

If y'all — if you want to, I don't know, come back — maybe come to my office at, say, 12.

MR. MOLCHAN: Twelve at your office, Your Honor?

THE COURT: Yes. And I do not need the court reporter.

MR. DOSS: Where is it?

THE COURT: Sixth floor.

MR. DOSS: Okay, thank you.

THE COURT: I'm not going to need you folks. I'll call and let you know what's going on.

THE CLERK: Okay.

THE COURT: Because if so, then we're going to go into jury selection right after lunch.

MR. MOLCHAN: You are going to give us a chance for lunch, though, aren't you?

THE COURT: It's not like you haven't had enough time walking around all morning.

MR. MOLCHAN: But I haven't eaten anything, though, Judge.

THE COURT: Yeah. If so, then we would [21] probably pick up jury selection at, say, 1:00.

(Recess)

[22] (Continuation of proceedings held 3/5/12)

MR. DOSS: Judge, the deputies had asked about Mr. Hurst being brought up. And we had, had a conversation about how he's going to be restrained, and they said he's got the box on his arms. I'm asking the Court for that to come off.

THE COURT: I just told them to completely unrestrain him.

MR. DOSS: Okay. Okay. Nevermind.

And one other thing, Judge. If I can have just a minute to explain to him what's going on today. I haven't talked to this morning. I talked to him last night, but I haven't talked to him this morning. So I'd like two minutes, three minutes.

THE COURT: That's fine. Do you want to go back there?

MR. DOSS: If they'll let me.

THE COURT: They'll can — they'll take you back there.

But let me look at this. I've got some notes on my sheet that I need to pass along probably to you folks. Juror Number 6 Maxwell Cole states that he attends school in Orlando. He is only here on spring break. Can serve for this week only. Number 42, which would be Jessica Davidson, states that she is a [23] financial hardship for any service because if she doesn't work she doesn't get paid. Nicholas Thorpe, Number 33, teaches class today at 5:30.

Do you folks want to go ahead and excuse Mr. Thorpe before I bring him in? I would presume if he is a teacher and he's teaching at 5:30 today, he would probably need to leave at five. Do you think that you folks are going to be finished before five?

MR. MOLCHAN: I doubt that, Judge.

THE COURT: Does the State want to excuse him before we bring him in? That would leave us 62 to choose from.

MR. MOLCHAN: I don't have any problem with that, Judge.

THE COURT: Mr. Doss?

MR. DOSS: I don't have a problem with that, Judge.

THE COURT: Okay. Let them know that Juror Number 33, I'm removing from my panel. And that would be Nicholas Thorpe. So if y'all would take him out before he even gets brought in.

MR. MOLCHAN: Judge, I don't have a problem — and Mr. Doss and I have talked about Juror Number 6 and Juror Number 42. Quite frankly, a student here on spring break I think would be — it would be – [24] hard-pressed to keep his attention. And then Ms. Davidson, if it's — if it's that much of a monetary hardship.

MR. DOSS: I completely agree, Judge. I think since we only have three, I don't see it as a problem. We still have 60 jurors to choose from.

THE COURT: All right. You folks are going to have to sit in the jury box because we're full house today.

All right. Security, if you could do it surreptitiously because I don't want the entire panel to know that these folks are being allowed to leave. It's going to be Juror Number 6, which is Maxwell Cole, Juror Number 33, Nicholas Thorpe, and Juror Number 42, Jessica Davidson, if you could send those three back down to jury management. And you can do that in front of everybody. Just tell them to go back down to jury management. Just don't tell them they're excused in front of the other panel members.

Mr. Doss, do you need to meet with him back there?

MR. DOSS: We're good. We took care of it, Judge.

THE COURT: You're good.

Mr. Doss, do you need a few more moments?

[25] MR. DOSS: If you would, Judge, I'd like to have maybe just two or three. I'm working through these — trying to get used to the —

THE COURT: To the new system. I understand.

(Pause in proceedings)

THE COURT: Mr. Doss, security has requested that because of the number of folks that we're going to have in here, with 60 people, that for security reasons I've directed that his feet remain — they just want to put the shackles on him. He is being seated behind a full desk that has a partition from top to floor. So I don't think that it's going to be a problem. I just wanted to let you know that.

MR. DOSS: As long as the jury can't see, that's fine.

THE COURT: I don't see how they possibly could.

All right. Mr. Doss, have you had enough time? Can I bring them in?

MR. DOSS: Yes, Judge.

THE COURT: All right. Bring in the jury, please — panel.

SECURITY OFFICER: Your Honor, the panel is seated.

THE COURT: Let the record so reflect.

[26] Good afternoon. I want to begin by apologizing. I know it's been a long morning and part of an afternoon for you folks. Please trust me when I tell you that we have been in here since early this morning trying to work out things so that we can make this process and the ensuing trial go as smoothly as possible.

Ladies and gentlemen, I am Judge Nobles, and I will be presiding throughout these proceedings. You will be participating with me and the other officers and personnel of the court as essential coworkers in the pursuit of justice. I am aware that for some of you this may be your first call to jury service, and these proceedings are totally unfamiliar to you. However, do not be apprehensive or feel inadequate. As we go along, the Court and the attorneys will acquaint you with the proceedings and instruct you as to what your role and duties will be.

There's some court personnel with whom you will be working, and in order that you may recognize them and know their respective duties, I'm going to take a few seconds to introduce them to you.

The deputy clerk of the circuit court seated to my left is my secretary in the courtroom. The court reporter seated directly in front of you records [27] eve-

rything that is said in the courtroom, including the statements that I am now making, the questions that later will be asked of you, your answers to those questions, and all other things that are done or said in this courtroom will be recorded by the reporter. The security officers — and you see them around the courtroom — enforce the Court's orders, and they have charge over the jury. If you desire information concerning your personal welfare, you should make your inquiries known to the security officer who will, if necessary, arrange with me to hear you on such matters. However, you must not question the security officer concerning the case that is being tried before you if you are selected as a juror.

You have previously been generally qualified to sit as jurors on cases to be heard during the course of this week. Shortly, the lawyers and the Court will have an opportunity to determine whether any of you are qualified or disqualified to sit on a particular case. This part of the proceeding is known as the voir dire examination. Voir dire means to speak the truth. When I suggest that some of you may be disqualified, I do not mean anything of a disparaging nature. Your individual disqualification as to a particular case may appear because you know something about the subject [28] matter of that case or you may know the parties or the lawyers involved. You may have some special bias or prejudice or experience or feelings about the facts of a case or the parties or the attorneys which would prevent you from being a totally impartial and unbiased juror. The object of the attorneys' questions is to obtain a jury that will impartially try the issues of each case upon the evidence presented in this courtroom without being influenced by any other factors. It is important that jurors be selected to hear each case who

do not have any preconceived notion or opinion about that case. With this in mind, please pay close attention to the questions asked of you by the lawyers and respond to each question as honestly and completely as you possibly can.

During the attorneys' questioning of you, questions may arise that you feel are pertinent. You may have some information touching upon your qualifications to sit as a juror on a particular case but perhaps the attorneys have not asked the appropriate question to get that information from you.

If there is any doubt as to whether you have information touching upon your possible disqualification, you should give the attorneys the benefit of that doubt and make that information known [29] to them. If the information is personal in nature and you prefer to discuss it outside of the presence of the other members of the panel, so indicate and you may come to the bench and discuss it with me in the presence of counsel. Therefore, do not look upon the questions propounded by the lawyers as an invasion of your privacy. The lawyers' questions are not meant to pry into your personal affairs and lives for their personal curiosity. Such questioning is solely to determine your qualifications and disqualifications.

In answering any questions asked of you by the lawyers, please, if you have not been referred to by name, state your name, speak loudly and distinctly so that all of us can clearly hear and understand your answers. Do not respond by just nodding or shaking your head and as it is as much necessary that you answer out loud so that the court reporter can record your answer. We are working off a seating chart and since there are a large of number of people in the courtroom today,

counsel, I also direct you to not only refer to them by name but also by number.

It is further important that I have your assurance that you will, without reservation, follow my instructions and rulings on the law and will apply that law to the case. To put it somewhat differently, [30] whether you approve or disapprove of the Court's rulings or instructions, it is your solemn duty to accept as correct those statements of the law, and you may not substitute your own idea of what you think the law ought to be.

The questions and statements that the attorneys say to you in determining your qualifications are not evidence in the case, nor are they the instruction on the law applicable to the case, and you are not to consider the attorneys' statements as such.

In the event we take recesses during the course of jury selection, before leaving for the recess, please take note of your neighbor to the left and to your right and the row that you were in and return to the same seat following the recess, as this will further expedite jury selection.

Please understand as well that if you see anyone that is involved in this case, we will not speak to you. We're not trying to be rude or aloof. All we're trying to do is avoid even the appearance of any sort of impropriety.

I'm also going to ask at some point, now — the attorneys are going to ask during some point during this selection process if anybody has a conflict with the trial. I understand that for many it is an [31] inconvenience to be here and I try to do the best that I can to accommodate folks, but I am here today to impanel a jury and

I intend to do so. If you do have a conflict or what you perceive to be a conflict, please raise your hand. I do not want to hear what they are at this time because it may not be necessary for me to hear. Just raise your hand. We will take note. Not now. I'm sorry. You don't even know the days yet. Anyway, I'm — or the attorneys are going to ask. We will take notes of the folks that raise their hands. If it is necessary, I will bring you up to the bench, and I will then hear from and allow the attorneys to ask any questions that they feel are necessary. Now, let me explain to you that sometimes folks out there believe that they have a conflict. Sometimes I don't believe that they have an appropriate conflict. So if you tell me you have a conflict and you end up on the jury, please understand that it was my decision and do not blame any sort of frustration you have on the attorneys or any party involved, okay?

In this case, the Defendant has been found guilty of murder in the first degree. An appellate court as reviewed and affirmed the Defendant's conviction. However, the appellate court set the case back to this Court with the instructions that the [32] Defendant is to have a new trial to decide what sentence should be imposed. Consequently, you will not concern yourself with the question of his guilt. The punishment for this crime is either death or life imprisonment without the possibility of parole. The final decision as to which punishment shall be imposed rests with the Judge of this court. However, the law requires that you, the jury, render the Court an advisory sentence as to which punishment should be imposed by the Defendant.

The State and the Defendant may now present evidence relative to the nature of the crime and the character background or life of the Defendant. You are instructed that this evidence is presented in order that

you might determine, first, whether sufficient aggravating circumstances exist that would justify the imposition of the death penalty and, second, whether there are mitigating circumstances sufficient to outweigh the aggravating circumstances, if any.

At the conclusion of the taking of the evidence and after argument of counsel, you will be instructed on the factors and aggravation and mitigation that you may consider.

At this time, please rise and raise your right hand, and the deputy clerk will swear you to answer [33] truthfully all questions asked of you as prospective jurors.

(Panel duly sworn)

THE COURT: All right. Be seated.

And I'm going to turn it over to Mr. Molchan first, followed by Mr. Doss.

MR. MOLCHAN: Thank you, Your Honor.

Good afternoon, folks. My name is John Molchan. I'm an assistant state attorney, and basically, I've been assigned to prosecute in this penalty phase the State of Florida versus Mr. Hurst. Alongside me is Ms. Jennifer Anderson. She'll be in here running around, and you'll see her. She's my assistant, and you'll see her from time to time in the courtroom from that standpoint. Mr. Doss, Mr. Todd Doss is the defense attorney in this case.

And the one thing that I want to talk about first of all is that none of us — this is a very unique aspect of the case. This is the only time in which you folks as jurors and us as lawyers are going to be able to talk back and forth. This is, like I said, the only time that this

will occur. If at any time after this if you're selected and you see us out in the halls or anything like that, you'll probably see us running the other direction. And it's not that [34] we're trying to be rude or anything like that. It's just that we want to avoid any appearance of impropriety, and we will basically duck and run the other way in that situation. So I wanted to let you know that because, in essence, this is that unique portion of the case.

As the Court has indicated, we described this as the voir dire section in which we ask you questions. None of the questions are meant to embarrass you. They are not meant to make, you know, like — really it's embarrassment or anything like. That's not our aim in this situation. The idea is to select twelve impartial jurors who can make a decision based upon the evidence that comes from the stand, from the instructions from Her Honor, from the exhibits, and if you're seated and chosen as a juror, render a fair and impartial advisory sentence in this situation.

Now, that's — it's, kind of, a — you, kind of, have an idea of what we're talking about, but let me get a little more specific about this. Everybody on this panel from age whatever to whatever has had life experiences. We all have our own opinions. We have our biases. We have our little idiosyncrasies, if you may. And that's perfectly fine. Everybody has those. The question is, one, whether or not those life [35] experiences that you've had are of such a nature that they would interfere with your verdict if you're chosen as a juror in this case. Does that make any sense?

I mean, in essence, and probably the best way to describe this example is to look at a case. Let's say if we were choosing an embezzlement case that was —

that was — we were dealing with, and let's say, Mr. Preble, you had been a businessman, you had, had that embezzlement, let's say an employee of yours had embezzled funds from a business that you ran. I understand you're a manager. You're in that supervisory capacity. If we were in the process of selecting that type of case and you had gone through that type of life experience, would there be a question as to whether you could be fair and impartial in that situation? I think understandably you would see that kind of situation.

I think we had several nurses out there. If there had been a drug case or something like that, if that had been something in your life experience that you had gone through, certainly you would have personal opinions.

Does everybody, kind of, see what we're talking about right now? And, again, it doesn't mean, you know, it doesn't mean you're a bad person or, you [36] know — just some of us have reached that age where we have our own opinions. Only you can tell us. We're dependent upon you for your honesty, and certainly in a case such as this, your honesty, your candor in making the statements that you're going to make in response to the questions. Because, again, we can't — we're dependent upon your answering the questions and answering the best way you can.

Now, I will say that most of you, and it's been my experience, had not thought too much about the death penalty questions and the things like that. And then today you've been brought into this jury box and probably not expecting that this would be something that you'd be brought into. Some people may have quiet responses to questions that you don't know, and that's

perfectly fine, too. Because, again, there'll be some very difficult questions that we're talking about.

Now, this particular case, as the Court has indicated, happened, and the actual crime occurred on May the 2nd of 1998. It happened. It involved an accident and the murder of Cynthia Harrison at the Popeyes on Nine Mile Road within Escambia County, and at this point, as the Court has indicated, Mr. Hurst has been convicted of that and we are in the process of doing a new penalty phase in this regard.

[37] Now, does anybody know Mr. Doss?

THE COURT: Mr. Doss, if you could do me a favor and stand up for those in the back?

MR. MOLCHAN: Anybody know Mr. Doss?

A negative response from the panel.

Also, Mr. Hurst, Timothy Hurst, the Defendant in this case, anybody know Mr. Hurst?

THE COURT: Mr. Hurst, can you stand up please so that they can see in the back?

MR. MOLCHAN: Or members of his family?

THE COURT: Thank you very much.

MR. MOLCHAN: Okay. Now, we have a seating chart. Pardon if I say numbers and things like that. I'm not trying to be insulting. But the hardest person that's working here today is the court reporter, and she doesn't take down a shrug of the head or anything like this. So we talked about numbers.

And I believe Ms. Lelia Booker, Number 14, you indicated you raised your hand?

PROSEPCTIVE JUROR: Yes.

MR. MOLCHAN: Did you know either Mr. Hurst his family?

PROSEPCTIVE JUROR: I know his stepfather.

MR. MOLCHAN: Okay. And we won't go into any other things at this point. Thank you, ma'am.

[38] Anybody else?

Now, Ms. Cynthia Harrison was a person who was killed on May 2nd, 1998. Anybody know Ms. Harrison? She was an employee of the Popeyes. At that point was an assistant manager. Anybody know Ms. Harrison or members of her family?

Again, negative response from the family (sic).

Let me ask the panel as a group how many of y'all believe everything you read in the newspaper; see on TV?

How many of you on the panel — and I just want a show of hands. I don't want to hear what — if you've heard or seen or anything like that — by a show of hands and we'll go through and identify. How many of you know something about the case? And if we can get a show of hands for the first row first. Anybody on — you know, based upon the short facts, anybody on the first row know anything about the case through media accounts or anything like that?

Second row. I believe Ms. Booker, Number 14. Again, kind of, like school again. You're back in, kind of, the school situation. Ms. Smith?

PROSEPCTIVE JUROR: Yes.

MR. MOLCHAN: Okay.

[39] THE COURT: Refer by number, too.

MR. MOLCHAN: This will be Number 22, Ms. Roxie Smith. Anybody else on the second row?

Third row. Bear with me while I — Ms. Sykes, Number 30.

PROSEPCTIVE JUROR: Yes.

MR. MOLCHAN: Anybody else on the third row?

Fourth row. Mr. Mauldin, Number 47.

Fifth row and last row. Mr. Felty.

PROSEPCTIVE JUROR: Yes, sir. I would like to talk to the Judge about something, sir.

MR. MOLCHAN: Okay. We'll put a note there at this time, sir, just because there'll be issues just that we have to deal with.

Now, was that an answer, yes, you do know something about the case, though?

PROSEPCTIVE JUROR: (Nodded head)

MR. MOLCHAN: Okay. Thank you, sir.

Anybody else on the last row, on the last row?

Okay. Now, of those that raised their hand that know, again, something about or heard something about the case — and, again, this is — this is where the idea of voir dire comes from. Only you can tell us.

Ms. Smith, I'm not trying to pick on you but [40] you're, kind of, one of the first ones up in the box. If you're selected as a juror, your responsibility to put anything you've seen or heard in the past outside the box, outside the room, outside this courthouse, and away from any type of deliberation in this box.

PROSEPCTIVE JUROR: (Nodded head)

MR. MOLCHAN: Now, do you feel that you can do that?

PROSEPCTIVE JUROR: (Nodded head)

MR. MOLCHAN: Okay. You need to speak out loud.

PROSPECTIVE JUROR: I'm sorry. Yes.

MR. MOLCHAN: You feel you can put it aside?

PROSEPCTIVE JUROR: Yes.

MR. MOLCHAN: And make a fair and impartial decision based upon the evidence that comes in this courtroom?

PROSEPCTIVE JUROR: Yes.

MR. MOLCHAN: And follow the instructions of the Court?

PROSEPCTIVE JUROR: Yes.

MR. MOLCHAN: And put aside anything out there?

PROSEPCTIVE JUROR: Yes.

MR. MOLCHAN: Any problem with that at all?

[41] PROSEPCTIVE JUROR: No.

MR. MOLCHAN: Okay. Ms. Booker, you know something about the case.

PROSEPCTIVE JUROR: Yes.

MR. MOLCHAN: Now, do you feel you can put that outside?

PROSEPCTIVE JUROR: No.

MR. MOLCHAN: Okay. I don't want to get into specifics because, again, there's no reason to. But you don't feel like you can put that aside?

PROSEPCTIVE JUROR: No.

MR. MOLCHAN: Okay. Mr. Stanfill, Number 29.

PROSEPCTIVE JUROR: Yes.

MR. MOLCHAN: You indicated — or did I write that wrong? No, I'm sorry. Should have been Ms. Sykes, right? I'm sorry. I can't read my own writing at times. There's really — I'm not going to give you an excuse. My glasses need fixing.

Ms. Sykes, you had indicated that you had heard something about the case? Now, the same type of question I asked both of these young ladies. Can you put aside what you've heard from whatever source? Are you able to put that aside and render a fair and impartial decision based upon what comes forward inside this courtroom and the instructions given by this [42] Judge?

PROSEPCTIVE JUROR: I wouldn't honestly think so.

MR. MOLCHAN: Okay. You don't think you can do that?

PROSEPCTIVE JUROR: No.

MR. MOLCHAN: Okay. Thank you, ma'am.

And then, Mr. Mauldin, basically —

PROSEPCTIVE JUROR: Yes.

MR. MOLCHAN: Number 47. You had heard something about the case, correct, sir?

PROSEPCTIVE JUROR: Correct.

MR. MOLCHAN: Now, again, the question to you is: Can you put that outside, leave it outside the courtroom on the courthouse steps?

PROSEPCTIVE JUROR: Yes.

MR. MOLCHAN: You can do that?

PROSEPCTIVE JUROR: Yes.

MR. MOLCHAN: No problem whatsoever?

PROSEPCTIVE JUROR: (Nodded head)

MR. MOLCHAN: Understand that everything that — any decision that you're going to be making has to be — occur as a result of what happens inside this room?

PROSEPCTIVE JUROR: Right.

[43] MR. MOLCHAN: No problem at all?

PROSEPCTIVE JUROR: No.

MR. MOLCHAN: Mr. Felty, you heard something about the case?

PROSEPCTIVE JUROR: Yes, sir, I know about the case.

MR. MOLCHAN: And do you feel you could put that — what you've heard aside?

PROSEPCTIVE JUROR: No, sir.

MR. MOLCHAN: Okay. Thank you, sir.

I'm going to go through a list of witnesses. You never know what's going to pop up. You don't know if your neighbor could be involved or a friend or whatever it is. Sometimes they do. Sometimes they don't. But, again, we have to ask that question. Because, again, the question is if a person that you know or friends with

in church, you are going to be given instructions regarding how you evaluate witnesses. And, again, you have to weigh that as you would any other witness. Certainly, your knowledge of persons could have an impact, and the question is will it or could it.

I'm going to call a number of names. There's an Anthony Brown. Mr. Brown is — used to work at Popeyes. A Tanya Crenshaw. James Freeman. He's with [44] the Escambia County Sheriff's Office.

Mr. Felty, you know him?

PROSEPCTIVE JUROR: (Nodded head)

MR. MOLCHAN: And Ms. Crenshaw was also known as Ms. Tanya Wilson now.

Captain Bates from the Escambia County —

Mister — okay.

Okay. A David Kladitis.

Negative response.

Carl Hess. Michael Williams. Cynthia Knight. She's now, I think, a Firehouse manager up on the North side. A Lee Smith. John Sanderson used to be with the sheriff's office.

Mr. Felty.

Buddy Nesmith.

Let me go back. Ms. Phelps, Number 25?

PROSEPCTIVE JUROR: Phelps. And on Captain Baits, was that Steve Bates?

MR. MOLCHAN: Yes.

PROSEPCTIVE JUROR: Yes, I know him.

MR. MOLCHAN: Let me just put a little note here, and I'll come back to you.

There was another hand. I just want to make sure I got before —

PROSEPCTIVE JUROR: Does Buddy Nesmith have a [45] different first name?

PROSPECTIVE JUROR: Yes. It's Donald.

PROSEPCTIVE JUROR: Okay. I do know him.

MR. MOLCHAN: We always — it's been known as that, but I do remember that.

Let me go back here. Catherine Lara, Number 20.

Then there's another in the back. Ms. Mary —

PROSEPCTIVE JUROR: Vrooman.

MR. MOLCHAN: Vrooman?

PROSPECTIVE JUROR: Yes.

MR. MOLCHAN: And which one —

PROSEPCTIVE JUROR: Buddy.

MR. MOLCHAN: Mr. Nesmith.

Okay. Let me start out with Ms. Lara real quick. You indicated you knew Mr. Nesmith?

PROSEPCTIVE JUROR: Yeah.

MR. MOLCHAN: And how did you —

PROSEPCTIVE JUROR: How do I know him?

MR. MOLCHAN: Yes, ma'am.

PROSEPCTIVE JUROR: I'm a nurse.

MR. MOLCHAN: Okay. In that relationship — in his investigation, your nursing, kind of, at times will come together?

PROSEPCTIVE JUROR: Patient/nurse.

[46] MR. MOLCHAN: Patient. Okay. Now, the fact that he would be a witness in the case and is a witness in the case, would you feel — let me back up a little bit.

The Judge is going to give you an instruction on how to evaluate witnesses, and basically, that applies to every witness that comes forward. Do you feel that you can put aside any type of prior, either prior good, bad type of interaction that you've had with him and evaluate his testimony as you would any other witness?

PROSEPCTIVE JUROR: Yes.

MR. MOLCHAN: Yes, you could?

PROSEPCTIVE JUROR: Yes.

MR. MOLCHAN: And then, Ms. Phelps, you indicated that you knew Captain Bates?

PROSEPCTIVE JUROR: Yes, sir.

MR. MOLCHAN: And then Sergeant Nesmith?

PROSEPCTIVE JUROR: Yes, sir. My brother is a deputy.

MR. MOLCHAN: Your brother is a deputy?

PROSEPCTIVE JUROR: I've just met them. I don't know them really well.

MR. MOLCHAN: Okay. You've met them in —

PROSEPCTIVE JUROR: I wouldn't recognize [47] Buddy, I don't think. Bates I would. But I don't know them very much.

MR. MOLCHAN: Again, the same question I just asked previous, would you be able to weigh their testimony as you would any other witness that we've talked to in accordance with the rules that the Judge is going to instruct you on?

PROSEPCTIVE JUROR: Most definitely.

MR. MOLCHAN: Wouldn't have —

PROSPECTIVE JUROR: Wouldn't bother me.

MR. MOLCHAN: Ms. — and I'm trying — Vrooman?

PROSEPCTIVE JUROR: Yes.

MR. MOLCHAN: Okay. I just wanted to make sure I said that right. You indicated you knew Sergeant Nesmith.

PROSEPCTIVE JUROR: With his wife.

MR. MOLCHAN: With his wife?

PROSEPCTIVE JUROR: With his wife.

MR. MOLCHAN: Have you — again, the same type of question. Would you be able to evaluate his testimony as you would any other witness?

PROSEPCTIVE JUROR: Yes, sir.

MR. MOLCHAN: Wouldn't have a problem with that at all?

[48] PROSEPCTIVE JUROR: No, sir.

MR. MOLCHAN: Okay. Mike Hallmark. He's now retired with the Escambia County Sheriff's.

I believe we have Mr. Felty.

PROSPECTIVE JUROR: I've got to go back. I raised my hand but you missed me.

MR. MOLCHAN: On Mr. Nesmith?

PROSPECTIVE JUROR: On Nesmith and — if it's Steve Bates, my kids went to school with him.

MR. MOLCHAN: Okay. And this is Mr. McBride, Number 51. Again, same question for you, sir. Would you be able to evaluate their testimony as you would any other witness?

PROSEPCTIVE JUROR: Definitely.

MR. MOLCHAN: No problem?

PROSEPCTIVE JUROR: No problem.

MR. MOLCHAN: I think, Ms. Phelps, you indicated that you knew Mr. Hallmark?

PROSEPCTIVE JUROR: Yes, sir.

MR. MOLCHAN: Jack Remus with the Florida Department of Law Enforcement. And I'll go back to Mr. Mauldin, Number 47. How do you know Mr. Remus, sir?

PROSEPCTIVE JUROR: I currently work with him now.

[49] MR. MOLCHAN: You work with him now?

PROSEPCTIVE JUROR: Yes.

MR. MOLCHAN: Well, that presumes — we'll come back to you. And, Mr. Felty, too, sir. And then the medical — the person that will be testifying is the medical examiner Doctor Michael Berkland. And, Mr. Felty, again — no. Okay. I'm not picking on you or anything. I just saw you shaking your head.

Now, let me ask this question, kind of, kicking back a little bit. How many of you guys have been stopped

by a law enforcement officer for, let's say, speeding or some type of traffic violation? Get a show of hands.

PROSPECTIVE JUROR: In our life?

MR. MOLCHAN: In your whole life. Yeah. Let's see a show of hands. The next question is, this particular case was worked by a number of law enforcement agencies: Escambia County Sheriff's Office, the Florida Department of Law Enforcement in this situation. And I ask this — and, again, and this idea of the voir dire and speak the truth, we realize that, you know, that all the interactions sometimes with a law enforcement may not be as rosy and as nice, and it certainly wasn't on the day you got those tickets. As expensive as they are nowadays, we [50] certainly understand that. My question is simply this: Is there anybody on this panel that has had any type of interaction with a law enforcement officer — and that means any type of interaction — to such an extent that they — and I called out a number of officers. I would assume that most of you didn't have any interaction with those officers because of virtue of what you said. But is there anybody that has had such an interaction with the officers that their judgment, their ability to be fair and impartial to the other officers that are going to be testifying would be impacted? Is there anybody that's had such a negative impact or interaction with a law enforcement officer — certainly on that day you didn't like it one way or the other. But the question is — and, again, only you guys can tell us — is there anybody who has had that kind of situation where it would cloud your judgment and make you not be fair and impartial in this situation?

Let me get back to my — Mr. Brackens?

PROSEPCTIVE JUROR: Right.

MR. MOLCHAN: Number 38. Now, a lot of times I'm not going — I want to explain something. I'm just writing down some things. We may come back to you and ask you certain questions. Of course you see the number of you that we have here. So a lot of times [51] we're, kind of, in the first step of the screening process, so to speak. So I may not go into a lot of detailed question with you at this stage because we'll do that maybe at a later time, and you may not even be involved with that. Does that make sense to y'all? Trying to just move through as we're moving around.

Now, has anybody had either themselves — and, again, I'm not trying to embarrass you — has had either themselves or family members prosecuted by any type of prosecutorial — a district attorneys office or anything like?

We'll start with the first row. Mr. Hall?

PROSEPCTIVE JUROR: Yes, sir.

MR. MOLCHAN: Second row? Mr. O'Steen?

PROSEPCTIVE JUROR: (Nodded head)

MR. MOLCHAN: Third row? Okay. Ms. Phelps, Number 25. Ms. Lucas, Number 28. Ms. Sykes, Number — that'd be Number 30. Anybody else passed that?

Fourth row? Mr. Brackens, Number 38. Anybody else?

And the last row? Is it Frank?

PROSEPCTIVE JUROR: Yes, sir.

MR. MOLCHAN: Ms. Frank, Number 56.

Now, Mr. Hall, again, go through a few questions with you. You had somebody that — that type [52] of experience?

PROSEPCTIVE JUROR: Yes.

MR. MOLCHAN: And, again, my efforts are not to embarrass you or anything, and we won't go into details. And, again, the question is, can you put that experience aside, understand — from both sides of this equation?

PROSEPCTIVE JUROR: Yes, sir.

MR. MOLCHAN: Have any problems in putting that experience aside?

PROSEPCTIVE JUROR: No, sir.

MR. MOLCHAN: None whatsoever?

PROSEPCTIVE JUROR: No.

MR. MOLCHAN: And you can provide this office with a fair and impartial decision and push that other experience aside?

PROSPECTIVE JUROR: Yes, sir.

MR. MOLCHAN: No problem at all?

PROSEPCTIVE JUROR: No problem at all.

MR. MOLCHAN: Thank you very much.

Mr. O'Steen, you've had that type of experience?

PROSEPCTIVE JUROR: Yes, sir.

MR. MOLCHAN: Question is, you know, can you put that and, kind of, leave that outside the [53] courthouse steps?

PROSEPCTIVE JUROR: Sure. Yes.

MR. MOLCHAN: Any problem with that at all?

PROSEPCTIVE JUROR: None.

MR. MOLCHAN: Ms. Phelps, Number 25.

PROSEPCTIVE JUROR: No problem.

MR. MOLCHAN: No problem putting it aside?

PROSEPCTIVE JUROR: (Nodded head)

MR. MOLCHAN: Ms. Lucas?

PROSEPCTIVE JUROR: No problem.

MR. MOLCHAN: No problem. Okay.

And then Ms. Sykes?

PROSEPCTIVE JUROR: No problem.

MR. MOLCHAN: Okay. Thank you.

And then, Mr. Brackens?

PROSEPCTIVE JUROR: I don't know.

MR. MOLCHAN: Don't know. Again, that's — you don't be — think that you go — a lot of people say that very question. It's something that you didn't think about when you got up in the morning, this morning, that you'd be asked or even contemplated. I certainly thank you for — and I don't know is certainly something you don't give a lot of thought to — I mean from the standpoint before you came in here today. So thank you, sir.

[54] Ms. — that's Number 38, Mr. Brackens.

Number 56, Ms. Frank.

PROSEPCTIVE JUROR: No problem.

MR. MOLCHAN: Now, in this — in what we're going to go through, you are going to be evaluating evidence, testimony, coming up with a recommendation to Her Honor regarding what should potentially happen to Mr. Hurst. You are in many ways sitting — you're

not sitting in judgment. You're sitting in judgment of the actions of a person on a given day.

Now, there's a lot of folks for religious or moral reasons do not feel that they can take that type of responsibility on their shoulders and do not want to. But if you are selected as a juror in this case, you're going to have to make a decision and a recommendation, and, in essence, sit in judgment whether you choose to recommend life or whether you choose to recommend death. That's something you're going to — that you'll be faced with. Is there anybody that because of either religious or moral grounds feels that they, you know — some people just have that belief — feel that they are incapable of going through the process that we're talking about?

Anybody on the first row?

Okay. Mr. Smith?

[55] PROSEPCTIVE JUROR: Yes, sir.

MR. MOLCHAN: Is it religious reasons or just —

PROSEPCTIVE JUROR: In general reasons.

MR. MOLCHAN: Okay. Mr. Smith, Number 1.

Second row? Okay. Ms. Booker, Number 14.

Ms. Hoag. Ms. Tayabas. That's Number 17.

Mr. O'Steen, Number 24. And Ms. Robinson.

Ms. Smith — Ms. Robinson is Number 23. Ms. Smith is 22.

Third row? Ms. Sykes, Number 30.
Ms. O'Daniel-Lopez, Number 32.

PROSPECTIVE JUROR: Yes.

MR. MOLCHAN: Fourth row? Ms. Mezick, Number 48. Ms. Bonnell, Number 46. Mr. Brackens, Number 38. Mr. Cangelosi?

PROSEPCTIVE JUROR: Cangelosi.

MR. MOLCHAN: Cangelosi. Sorry about that. Number 37. And Ms. Shipman, Number 40.

Okay. Last row? Let me figure out my numbers. Mr. Wilson, Number 50. Mr. Smith, 52.

PROSEPCTIVE JUROR: I want to ask a question.

MR. MOLCHAN: Yes, sir.

PROSPECTIVE JUROR: What was the question now?

MR. MOLCHAN: The question was basically [56] either because of religious or moral grounds that you feel — that you would not feel that you could sit in judgment and make a decision in this case. Some people have religious or moral or reasons that they feel that they cannot sit in judgment and sit in that jury box and make a decision and make a recommendation.

PROSEPCTIVE JUROR: On life?

MR. MOLCHAN: Life or death.

PROSEPCTIVE JUROR: What's the question about death?

MR. MOLCHAN: We'll just put a question mark by you for right now because we're going to go into more detailed questions in that regard.

Ms. Boylan?

PROSEPCTIVE JUROR: (Nodded head)

MR. MOLCHAN: Mr. Faircloth?

PROSEPCTIVE JUROR: (Nodded head)

MR. MOLCHAN: Number 60.

Thank you, folks.

Now, as the Court has already introduced this to you, your evaluation in this case is going to involve — we're going to present evidence. At the close of the evidence, there will be matters in aggravations, matters in mitigation, and you'll be instructed, ultimately, by Her Honor regarding the [57] process that you're to go through.

Now, just to, kind of, go through this process so you'll have a little better idea, there are basically two punishments: A recommendation of death or life. And in this situation, the State is required to prove what's known as aggravating circumstances beyond a reasonable doubt. So that's what we would be — when I'm sitting at this table — putting on what we viewed as statutory aggravating circumstances, and our burden is to establish those beyond a reasonable doubt. If those — if you reach the point where those exist, then you would go to the second part of the equation, and you would look at mitigating circumstances. Mitigating circumstances have to only be proven by — and I'll use the term the greater weight of the evidence, which means that they're on the mitigation. And that can be anything. There's statutory ones as well nonstatutory, and they just have to prove those by the greater weight of the evidence.

Now, at any juncture during this type of thing you first have to make a decision do the aggravatings exist. If you don't feel that we've proven them, then we go right — then it's a life recommendation. Does everyone understand that aspect of it? If we don't prove them,

that's it. Or if we have, then you look at [58] the mitigating circumstances.

And then there will be, basically, if you find aggravating and mitigating, you will then engage in a weighing process. Now, there's nothing that keeps you from just — and I think the instructions will indicate — there is nothing that requires you to assess a death recommendation, but the recommendation that you have to provide is one which the Judge must give great weight.

Now, that's the basic idea of what we're going to be going through during the next several days in this situation.

We're going to start asking you some questions about the death penalty. Some of you may or may not of thought about this prior to coming up here. And the question is — as we've talked about a number of these types of things, a number of the questions you may have personal opinions, either pro or anti-death penalty. The question is, can you put aside those opinions and follow the Court's instructions in evaluating the evidence?

Now, if I could, we'll start with a few questions. How many in the panel generally view their opinion as being in favor of capital punishment? By show of hands. We'll start with the first row. How [59] many would say — and, again, if you've never even thought about it, you may not have an opinion. But on the first row, how many of you would say you were — and I'll use the term in favor of capital punishment?

Ms. Preston. That is Juror Number 12. Mr. Hall, Juror Number 5. I'll stick with — Mr. Anderson. Yes, sir, Mr. —

PROSPECTIVE JUROR: Kranefuss.

MR. MOLCHAN: Kranefuss.

PROSPECTIVE JUROR: Could you repeat that?

MR. MOLCHAN: Well, I'm just asking as a general idea are you in favor of capital punishment or the death penalty? Just a general opinion. People may not have an opinion. You know, and you may not have one. I'm not saying that you have to have one. I'm just wanting to know if after contemplation you've thought about it. This is what —

PROSEPCTIVE JUROR: Do I have a problem with it? Is that —

MR. MOLCHAN: No. First, I'm just saying — well, let's just — we're going to go through that question a little bit later. I know where you're going with this, I think.

Yes, sir.

PROSPECTIVE JUROR: Are you asking if we're in [60] favor of its use or in favor of its legality?

MR. MOLCHAN: In favor of its use.

THE COURT: And that would be Number 15, Mr. Guthrie.

PROSPECTIVE JUROR: Yes.

MR. MOLCHAN: Now, does that help you?

PROSPECTIVE JUROR: Yeah. Then I'm okay with it.

MR. MOLCHAN: Now, on the first row that we have, are there any persons that are of the opinion that are against the death penalty, in this first row? Have formed an opinion that they're not in favor of it? And,

again, I'm talking about in the sense of an opinion about it. We're not getting into the analytical side, which I think is what you're getting at. We're just talking about your simple, yes, I'm in favor; no, I'm not in favor. Anybody on the first row would say, no, I'm not in favor?

Second row. Let's talk about those in favor of the death penalty on the first row?

Mr. Akbari?

PROSEPCTIVE JUROR: Yes.

MR. MOLCHAN: Number 18. Anybody else on the second row?

And those who would say they're against.

[61] Mr. O'Steen?

PROSEPCTIVE JUROR: Yes, sir.

MR. MOLCHAN: Anybody else? Ms. Booker, pro or anti? Against it or for it?

PROSEPCTIVE JUROR: I'm against it.

MR. MOLCHAN: Against it.

Anybody else on the second row?

Third row. Let's start with what I would say is those in favor of the theory of capital punishment and the idea.

Ms. Phelps, Number 25. Ms. Henderson, Number 26. Ms. Lucas, Number 28. Mr. Stanfill, Number 29. And down the row to Mr. Rourke, Number 36.

Now, anybody on the third row that is not against the death penalty — has opinion an opinion against the death penalty?

Ms. Bell and Ms. Sykes.

The fourth row, those, again, have a favorable opinion or idea of it?

Mr. Mauldin, Number 47. Mr. Moye.

PROSEPCTIVE JUROR: Moye.

MR. MOLCHAN: Number 45.

Mr. Easterlin?

PROSPECTIVE JUROR: Yes.

MR. MOLCHAN: 43.

[62] And those who have an opposing — against the death penalty?

Mr. Cangelosi, Number 37. Mr. Brackens, Number 38. Ms. Mezick, Number 48. Negative.

The last row. Certainly last but not least. Those in favor. Start on this side. Ms. Morgan, Number 62. Mr. Bragg, Number 61. Mr. Sullivan, Number 57. Mr. Farrington?

PROSEPCTIVE JUROR: Yes.

MR. MOLCHAN: Number 54.

Anybody on the back row in opposition or has a different opinion and not in favor of the death penalty? The last row.

Mr. Smith, Number 52.

Now, those of you that have opinions — and as I've explained from the very beginning, everybody can have their own opinion. That's not the issue at this stage of the proceeding in any way, shape, or form. And, certainly, everybody respects whoever has the opinion. The question becomes, can you put that opinion aside

and make your decision based upon the evidence and the instructions of the Court? And the idea is you may be against the death penalty. You may be in favor of the death penalty. But the question is, whatever your personal opinion, are you able to put it [63] outside and leave it outside — and leave it there? And only you can tell us that. Nobody else can't — we can play a lot of, you know, games and things like that about asking questions. But the question is, can you put that opinion aside, sit in that jury box, listen to the — listen to the testimony, listen to the instructions, and make a fair and impartial decision based upon what happens in this courtroom and leave it behind?

Now, let's go through a little bit of this. Mr. Anderson, you indicated you were — you feel you can, basically, look at all the evidence and make a fair and impartial decision based upon what happens in this setting. Any problem with putting aside your opinion?

PROSEPCTIVE JUROR: No, sir, no problem.

MR. MOLCHAN: One way or the other?

PROSEPCTIVE JUROR: No, sir.

MR. MOLCHAN: Mr. Kranefuss, you indicated that you had an opinion, and I'm not even going to talk about that because it really isn't relevant which way you go. The question is, and only you can answer, can you make your decision based upon what happens in this courtroom?

PROSEPCTIVE JUROR: Yes.

[64] MR. MOLCHAN: Any problem with that?

PROSEPCTIVE JUROR: No.

MR. MOLCHAN: Leave your opinion on the front steps of the courtroom as you walk in?

PROSEPCTIVE JUROR: Yep.

MR. MOLCHAN: Mr. Hall?

PROSEPCTIVE JUROR: Yes, sir.

MR. MOLCHAN: Any problem with leaving your opinion on the front steps?

PROSEPCTIVE JUROR: No, sir.

MR. MOLCHAN: Ms. Preston, again, you indicated you had an opinion. You feel you can leave it out there, or is it something that could have an influence while you're sitting there inside the jury box?

PROSEPCTIVE JUROR: I can leave it.

MR. MOLCHAN: Okay. No problem at all?

PROSEPCTIVE JUROR: No, sir.

MR. MOLCHAN: Ms. Booker, you had indicated you had an opinion. Do you feel that you can make a decision evaluating the evidence and leave your opinion outside about the death penalty?

PROSEPCTIVE JUROR: I don't believe in the death penalty.

MR. MOLCHAN: Well, the question is, you may [65] not believe in it, that doesn't necessarily mean that you're excluded as a juror in the case. The question is, can you put aside your opinion, look at all the evidence, and make a decision in accordance with the instructions and the evidence that comes in front of you?

PROSEPCTIVE JUROR: No.

MR. MOLCHAN: Okay. That's Juror Number 14, Ms. Booker.

Juror Number 18, Mr. Akbari, again, you have your opinion. Do you feel you can leave it out there on the front steps?

PROSEPCTIVE JUROR: No problem.

MR. MOLCHAN: Okay. Mr. O'Steen, you had indicated —

PROSEPCTIVE JUROR: Absolutely not.

MR. MOLCHAN: You couldn't leave it out there on the front steps. Thank you, sir.

Ms. Phelps, you had an opinion.

PROSEPCTIVE JUROR: I can leave it.

MR. MOLCHAN: Leave it on the front steps?

PROSEPCTIVE JUROR: Yes.

MR. MOLCHAN: Ms. Henderson, same question. Can you leave it out there?

[66] PROSPECTIVE JUROR: Yes.

MR. MOLCHAN: No problem at all with that?

PROSPECTIVE JUROR: (Nodded head)

MR. MOLCHAN: Ms. Bell, you indicated you had an opinion. The question is, can you leave it out there and make a decision that's based upon the evidence and the instructions of the Court?

PROSEPCTIVE JUROR: Yes, I can.

MR. MOLCHAN: You can?

PROSEPCTIVE JUROR: (Nodded head)

MR. MOLCHAN: Ms. Lucas?

PROSEPCTIVE JUROR: I can leave it.

MR. MOLCHAN: And, Mr. Stanfill?

PROSPECTIVE JUROR: Yes, sir.

MR. MOLCHAN: Leave it out there on the front steps?

PROSEPCTIVE JUROR: Yes, sir.

MR. MOLCHAN: Ms. Sykes?

PROSEPCTIVE JUROR: No, sir.

MR. MOLCHAN: Thank you, ma'am.

Mr. Rourke?

PROSEPCTIVE JUROR: No.

MR. MOLCHAN: You can't leave it out there?

PROSEPCTIVE JUROR: No.

MR. MOLCHAN: Fair enough. Thank you, sir.

[67] Mr. Cangelosi?

PROSEPCTIVE JUROR: No, sir.

MR. MOLCHAN: You can't leave it out there?

PROSEPCTIVE JUROR: No, sir.

MR. MOLCHAN: Mr. Brackens?

PROSEPCTIVE JUROR: No, sir.

MR. MOLCHAN: That's Juror Number 37, first, Mr. Cangelosi, and then the second Mr. Brackens, Number 38, just for the record to be clear.

Mr. Easterlin?

PROSEPCTIVE JUROR: Here.

MR. MOLCHAN: I think you had an opinion.

Again, can you leave it out there?

PROSEPCTIVE JUROR: Totally impartiality here.

MR. MOLCHAN: Impartial?

PROSPECTIVE JUROR: Yes.

MR. MOLCHAN: No problem with that at all?

PROSEPCTIVE JUROR: No problem leaving my opinions elsewhere.

MR. MOLCHAN: Mr. Moye? Is it Moye? Again, you had indicated you had an opinion. Question is —

PROSEPCTIVE JUROR: I'm not sure.

MR. MOLCHAN: Again, that's something, quite honestly, sir, is a valid answer. Because it's something that you didn't come in here to this day [68] thinking you'd be asked questions about that. And, again, we depend on your feedback and your honesty. And thank you.

Mr. Mauldin, can you leave that —

PROSEPCTIVE JUROR: No.

MR. MOLCHAN: — opinion —

PROSEPCTIVE JUROR: No.

MR. MOLCHAN: — out there?

PROSEPCTIVE JUROR: (Nodded head)

MR. MOLCHAN: No. That's Juror Number 47.

And I think Mr. Moye is Number 45, just for the record.

Ms. Mezick, you had indicated you had an opinion. You feel you can leave it outside?

PROSPECTIVE JUROR: I could not, no.

MR. MOLCHAN: I can't hear you.

PROSEPCTIVE JUROR: No, sir.

MR. MOLCHAN: Last row. Ms. Morgan had an opinion. Can you leave it outside the door?

PROSEPCTIVE JUROR: Yes, sir.

MR. MOLCHAN: Okay. Mr. — that's Number 62.

Mr. Bragg, Number 61, can you leave that opinion out there on the doorsteps?

PROSEPCTIVE JUROR: Yes, sir, I can.

MR. MOLCHAN: Mr. Sullivan, you had indicated [69] you had an opinion. The questions is, again, that opinion has no business in here. Feel like you can leave it outside?

PROSEPCTIVE JUROR: Yes, sir.

MR. MOLCHAN: Any problem with that at all?

PROSEPCTIVE JUROR: No.

MR. MOLCHAN: Mr. Farrington, again, same based question to you. You had an opinion. Do you feel you can leave it at the steps of the courthouse?

PROSEPCTIVE JUROR: Yes, I do.

MR. MOLCHAN: Any problem with that at all?

PROSEPCTIVE JUROR: No.

MR. MOLCHAN: Mr. Smith?

PROSEPCTIVE JUROR: No.

MR. MOLCHAN: You can't leave it outside the courthouse?

PROSEPCTIVE JUROR: (Nodded head)

MR. MOLCHAN: Thank you, sir.

And, Mr. Wilson, you indicated you had an opinion. Or, no, I'm sorry. I've got that — misread my own handwriting there.

Now, in this particular situation, the voting that goes on the guilt phase — how many of y'all have been jurors in a regular petit jury type setting? Just by show of hands.

[70] And, again, in that setting, Mr. Stanfill, I think you had to have a unanimous verdict?

PROSEPCTIVE JUROR: Yes, sir.

MR. MOLCHAN: I would say that in this situation, again, this is — the voting that goes on, there'll be 12 of you, and there must be at least more than — there has to be more than six or seven. It's not a unanimous verdict as a recommendation situation. While it doesn't diminish what we're talking about, that is the process that we'll go through. Does anybody feel bothered by that aspect of the case?

I just wanted to let you know that, that's, kind of, different than your normal type of jurors.

Does everybody basically understand the weighing process that I talked about, what we're going to be going through if you're selected as a juror? Everybody have a basic, kind of, understanding of that?

Now, let me finish up because I would be remissed if I didn't ask this question. There will be photographs that are — that you'll be looking at that are, I will say — I'll use the word gruesome. They're not particular ones that you want to look at. But they're not meant to inflame you. They're there to illustrate one of the aggravating factors. But I understand that some people

view that differently. Is [71] there anybody that feels that they would not be able to look at those — and I hate to use — there's, kind of — and I use the term dispassionate, but an objective type of thing? There has to be an objective analysis in this situation. Does anybody feel that they're not — they would not be able to look at those type of photographs at all, period?

Okay. Ms. Vrooman?

PROSEPCTIVE JUROR: Yes.

MR. MOLCHAN: Anybody else?

Now, in accordance with the Judge's last instructions, I'm looking — we'll start row by row. If I can just get people to identify — I anticipate that this case could take most of the week. I think that's a fair assessment. And, again, we're — we all understand the jury selection and the jury process is one that's certainly is a — takes up a person's time, but we're also looking for somebody — if there's a particular hardship or problem that would, you know — I want to identify those folks first that have something that they consider to be pretty significant. And please understand when the Judge is going to be evaluating, that it's going to have to be something pretty significant.

In the first row, anybody have particular [72] problems?

Let's start with Mr. Beverly. And I'm just going — Judge, you just want me to identify them at this point, or do you want —

THE COURT: All I want is name and number.

MR. MOLCHAN: Mr. Beverly, Number 3.

Mr. Hall, Number 5. Mr. Hicks, Number 9. Ms. Swanson, Number 11.

Okay. Anybody on the first — second row? Ms. Smith, Number 22. Ms. Laura — I'm sorry. Ms. Evans, Number 21. Anybody else on that row?

Third row, Ms. Bell, Number 27.

PROSEPCTIVE JUROR: I have a question.

MR. MOLCHAN: Cranford?

PROSEPCTIVE JUROR: No.

MR. MOLCHAN: O'Daniel-Lopez, Number 32.

PROSEPCTIVE JUROR: I have a question.

MR. MOLCHAN: Yes, ma'am.

PROSEPCTIVE JUROR: Would this be during, like, normal hours or —

MR. MOLCHAN: If you want me to answer that, Judge, I can.

THE COURT: Except for Wednesday.

MR. MOLCHAN: Generally, we'll go from 9 o'clock in the morning until 5 in the evening. There [73] will be the exception on Wednesday. Wednesday, because of some witness issues, will be a lot longer — and we'll talk about that — will be a longer day. And I'm not sure how we're going to break that up. But I will tell you we'll go into the evening hours. At this point, that's the thing. But there'll be mid-morning breaks. You'll have lunch. The normal types of things are eight to five. However, deliberations, if you deliberate, that's up to y'all. That's, kind of, the odd — that's something none of us can really predict because there's people in there. Does that answer your question?

PROSEPCTIVE JUROR: Yes.

MR. MOLCHAN: Mr. Rourke, Number 36. Ms. Boyden, Number 35. Anybody else?

Okay. Fourth row, problems schedule wise?

Ms. Mezick, Number 48. Ms. Bonnell, Number 46. Mr. Moye, Number 45. Mr. Stambolic, Number 44. Ms. Denim, Number 41. Ms. Shipman, Number 40. Mr. Kilgo, 39. Mr. Brackens, Number 38. And Mr. Cangelosi, Number 37.

Last row. Starting with Mr. Register (phonetic). Mr. Faircloth, Number 60. Ms. Whitehurst, Number 59. Ms. Vrooman — I'm going to get that right before it's over with — Number 53.

[74] That's all I have. I don't have any other questions at this time, Judge.

THE COURT: All right. Mr. Doss. Actually, counsel, approach.

COURT REPORTER: Do you need me?

THE COURT: No, thank you.

(Off-the-record discussion)

THE COURT: All right. Normally the way the jury selection goes is the first up has the first opportunity and asks a lot of questions. Mr. Molchan probably asked a lot of questions that Mr. Doss was planning to ask because Mr. Doss doesn't have any idea what Mr. Molchan is going to ask. So while Mr. Doss is entitled to equal time, I'm not sure that he's going to take equal time. But, again, he's entitled to that. And just so that I make sure that you folks aren't distracted, we're going to take just a break to let you folks go out.

Now, I will tell you because you are potentially — each of you are potential jurors in this case, please do

not talk about this case, about any of the things that you've heard, or any of the questions that have been given to you. Because the point is, we want impartial jurors, and we don't want the source of any feelings or opinions to come from anyone else. So [75] step outside, if you will, take care of business, come back in, and just five minutes. Do look, please, to your left and to your right, the row that you're in, we can make sure we get everybody else in. Thank you.

I am going to ask everyone to step out even if you don't feel you have the need. Thank you.

(Panel out)

THE COURT: Counsel, just an update. Just an update, I don't know whether my notes are correct or not, but if all the conflicts are legitimate, we're down to 26.

I said that if my notes are correct, if all the conflicts are legitimate, we are down to 26 jurors.

Let me put that on the record. Apparently Juror Number 58, Chris Dellnuava (phonetic), approached the security officer to say that he was a retired corrections officer, and he did not know whether Mr. Hurst was familiar or not, but I don't know if somebody wants to get into that. I don't know if Mr. Hurst has ever been where this gentleman ever even worked. But that's —

MR. DOSS: Not unless he worked at UCI.

THE COURT: But I don't know whether he has or not, but you folks can ask. Anyway —

MR. DOSS: Judge —

[76] THE COURT: What we'll do — do you need this on the record? If you want to, that's fine.

MR. DOSS: Probably so just to be...

Judge, Mr. Molchan and I were talking. What I was thinking was a couple of things: One, we got a lot of people that say they have conflicts, and when Mr. Molchan was asking the question about if somebody had, had really strong feelings one way or the other as far as the death penalty for or against, I circled everybody that said they couldn't put it aside. What I was suggesting to Mr. Molchan — and I think he was concurring — maybe — and I'll go through aggravation and mitigation some. A lot of times jurors have misconceptions about what's going on. I was thinking maybe if we brought those people back in that said that they had such a strong opinion one way or the other, we'll go through some death qualifying with them just to see whether or not they really do or they really don't, you know. I think that might be a good way to handle it. I'm going to talk generally about aggravation and mitigation. We might add somebody to the list.

THE COURT: Well, I still — I should have — still have 13 people down in a pool.

THE CLERK: Fourteen.

[77] THE COURT: Fourteen people down in a pool. Of course, that would mean, obviously, going through everything again, but at least we've got 14 should the need arise.

MR. DOSS: Okay.

THE COURT: And, of course, you folks don't have to use all of your strikes either.

MR. DOSS: That's true, Judge. And along the ideas of using strikes, I was also thinking that it would be better if we had, at some point, and I'm not suggesting when, but before we start selecting, that people, as far

as the ones that think they have a conflict, if we go ahead and have Your Honor make a ruling on that just that we're not burning strikes not knowing whether we're going to get to some of these people that may or may not be on there, just from a strategic standpoint.

MR. MOLCHAN: I mean, that's really a pretty good idea. There's a number of people that said they had scheduling issues.

THE COURT: There were a bunch.

MR. DOSS: And it seemed to swell.

MR. MOLCHAN: As we went to the back.

THE COURT: Correct.

MR. MOLCHAN: I think another question is how [78] we want to bring them up.

THE COURT: Because, normally, I wouldn't do it until their name was called, but do you want me to go ahead and do them all and bring them up one at a time before y'all start going down the row?

MR. MOLCHAN: I would think —

MR. DOSS: I don't have a problem with that.

MR. MOLCHAN: I would like that.

THE COURT: That's fine. I'm easy.

MR. DOSS: Something that I've seen a couple of other Judges do so they don't go back out and tell them what their excuse was, was either holding them in here until Your Honor makes a decision on everybody, or if there's an alternate way out of here, as you decide they're out, they shoot them out the other way, so that it wasn't one of those things where, like, oh, did you get off?

THE COURT: They don't know until the end. I don't tell them whether I think it's valid or not.

MR. DOSS: I see what you're saying. That achieves the same purpose.

THE COURT: Yeah, I send them back, and they don't know until we call out the name of the jurors.

MR. DOSS: We just know.

THE COURT: Yes. You know; they don't.

[79] MR. DOSS: Fair enough.

THE COURT: All right. If you folks need to take a break. You have the same count I do, Mr. Molchan?

MR. MOLCHAN: I don't know. I stopped right — I just missed a few. I got quite a few.

MR. DOSS: There's a lot.

(A recess was taken)

THE COURT: We're back on the record, please.

We're going to go ahead and bring them back individually, and the folks that said they had a conflict — and please, Mr. Doss and Mr. Molchan, if you will also compare with me. But I believe we had Number 3, Austen Beverly.

MR. MOLCHAN: Correct.

THE COURT: We had Number 5, Larry Hall. Number 9, Nathan Hicks. Number 11, Erica Swanson.

To the next row. It would be Number 21, Angela Evans. Now, folks, we had Number 22, Roxie Smith, but she also said morally she couldn't sit on these type of cases. Do you think it's necessary to bring her back in?

MR. DOSS: Yes, Judge, that's what we were going to address as far as bringing back in the people that were on moral grounds one way or another, so.

[80] THE COURT: So are we bringing in only the conflict people? Or are we bringing in all of them?

MR. DOSS: For right now I think it's conflict, and then we'll go through and do those others at the end.

THE COURT: So then we have Roxie Smith, Number 22. We had on the third row Joyce Bell, Number 27. We had Number 32, Joelle O'Daniel-Lopez. Number 35, Jenni Boyden. And Number 36, Timothy Rourke. We had 37, Anton Cangelosi, and that's C-A-N-G-E-L-O-S-I. We had 28, Rodney Brackens. I'm sorry. 38, Rodney Brackens. 39, Andrew Kilgo. 40, Karen Shipman. 41, Misti Denham. 44, Steven Stambolic. 45, Richard Moye. 46 Kristin Bonnell, and that's B-O-N-N-E-L-L. 48, Karen Mezick. 55, Mary Roman — I'm sorry. 53. I know, I had it crossed out. 53 is Mary Roman. 59, Brandi Whitehurst. 60, Samuel Faircloth. And I believe that's it. You folks agree?

MR. DOSS: Exactly what I had, Judge.

THE COURT: All right. Then what I'm also going to do, too, is I'm going to get Mr. Hurst. Because when I bring them in, we're going to bring them up here. And Mr. Hurst is — got shackles on his ankles, and I don't want them to see him. So I'm going to put Mr. Hurst in the witness box with his attorney [81] standing next — also so he can participate and hear what's going on.

SECURITY OFFICER: Judge, when we bring them in, just bring them in one at a time, or do you want to bring them all and have them sit here and then call them up? Or how do you want do it?

THE COURT: I think I'd just line them up and bring them one at a time.

All right. If you want to start bringing them in.

(Prospective juror at the bench)

THE COURT: Come on up, sir. You're just the one — the first of many, so come on up. If you'll just stand right up here next to the court reporter. We're going down the list, and I had actually — I had indicated that Mr. Molchan would be asking, or Mr. Doss, as to the conflict. This is Juror Number 3, Austen Beverly. And you did state that you had a conflict. What is that conflict?

PROSEPCTIVE JUROR: Just the fact that I'm still in high school. I've got to go to school all week long.

THE COURT: Okay. All right. Then I guess what I will do is I will turn it over to counsel to ask questions. Mr. Molchan, do you have any?

[82] MR. MOLCHAN: Where are you going to school at, sir?

PROSEPCTIVE JUROR: Escambia.

MR. MOLCHAN: Okay. And spring break isn't until...

PROSEPCTIVE JUROR: It's not until, like, two weeks.

MR. MOLCHAN: And you're a senior?

PROSEPCTIVE JUROR: Yes, sir.

MR. MOLCHAN: Okay. I don't have any other questions.

THE COURT: Mr. Doss?

PROSEPCTIVE JUROR: None.

THE COURT: All right, sir. Thank you. Go ahead and step out.

(Prospective juror excused)

THE COURT: I think that's the first time I've ever had a high school student.

MR. MOLCHAN: I've never had one.

(Prospective juror at the bench)

THE COURT: All right. Hi, Mr. Hall. We're bringing you folks in one at time. You had indicated that you have a conflict?

PROSEPCTIVE JUROR: Yes, ma'am. I'm supposed to be in Savannah Thursday for a regional meeting for [83] my job.

THE COURT: All right. I'm going to ask a couple of questions. Then I'm going to turn it over to counsel. Who do you work for?

PROSPECTIVE JUROR: I work for Air Methods. It's a helicopter vendor. I run 18 bases in the state, and it's the southeast business meeting.

THE COURT: Okay.

PROSPECTIVE JUROR: All right. Mr. Molchan?

MR. MOLCHAN: What is it —

PROSEPCTIVE JUROR: I'm driving. I'll have to leave Wednesday night to be there at 8 o'clock in the morning in Savannah.

MR. MOLCHAN: Are you meeting with your corporate head — boss?

PROSEPCTIVE JUROR: Yes, my boss — my vice president.

MR. MOLCHAN: Is it one of these scheduled type of situations?

PROSEPCTIVE JUROR: This one came out about two weeks ago.

MR. MOLCHAN: Are you doing contract with —

PROSEPCTIVE JUROR: I do contract work, yes, sir.

MR. MOLCHAN: With the military?

[84] PROSPECTIVE JUROR: No, sir. We do the civilian EMS. Like, I run the — I own the helicopter at Baptist Hospital. I used to work for them, but I own that helicopter and 18 of them like them in the state. And this is the southeast.

MR. MOLCHAN: And you have to leave Wednesday?

PROSPECTIVE JUROR: Yes, sir.

MR. MOLCHAN: And be up there Thursday?

PROSPECTIVE JUROR: Yes, sir.

MR. MOLCHAN: I don't really have any other questions, Judge.

THE COURT: Mr. Doss, anything?

MR. DOSS: I didn't hear when you're coming back.

PROSPECTIVE JUROR: I'll be back Friday morning. I leave to come back Friday morning. It's an all-day meeting. Yes, sir.

THE COURT: All right, sir. Thank you.

(Prospective juror excused)

THE COURT: And when we finish this row, I'll have them stop, and I'll ask you folks whether you agree or not.

(Prospective juror at the bench)

THE COURT: Come on up, sir. This, I believe, would be Mr. Hicks, Juror Number 9. All right, [85] Mr. Hicks, we're just asking people about their conflicts now. You indicated you had one. It would be?

PROSEPCTIVE JUROR: I'm a full-time student at UWF, so I have exams throughout the week.

THE COURT: All right. This is exam week already?

PROSEPCTIVE JUROR: Well, no. I mean, I have an exam tomorrow for my media class, and I have another one Thursday. We don't have midterms until the week after, but we have — still have exams throughout the week.

THE COURT: Okay. Mr. Molchan?

MR. MOLCHAN: I don't have any questions, Judge.

THE COURT: Mr. Doss?

MR. DOSS: No questions.

THE COURT: Thank, you sir.

(Prospective juror excused)

THE COURT: Then after Mr. Swanson, if you'll take just a break for a moment — or Ms. Swanson. I'm sorry.

(Prospective juror at the bench)

THE COURT: Come on up, ma'am. This is Ms. Swanson.

[86] PROSPECTIVE JUROR: Yes.

THE COURT: Juror Number 11. You had indicated that you have a conflict. We're just asking about it now.

PROSEPCTIVE JUROR: I think I made alternate arrangements now that we're on break.

THE COURT: Oh, so you don't have a conflict anymore?

PROSPECTIVE JUROR: Not anymore.

THE COURT: I very much appreciate you trying to make accommodations. Thank you. All right. Go back out.

(Prospective juror excused)

THE COURT: All right. Hold up and let me confer with counsel.

On Number 3, do you both agree to the conflict?

MR. MOLCHAN: I think so.

MR. DOSS: I think so.

THE COURT: How about Number 5, the man with the meeting?

MR. DOSS: He's going to be one upset man if he misses a meeting with the vice president.

THE COURT: So do y'all want to hold off at that point in time? It's not for a cause but we'll [87] wait and see. Is that what you're saying?

MR. MOLCHAN: I say go ahead for cause, Judge.

THE COURT: Oh, you are saying for cause?

MR. MOLCHAN: Yeah, to me, Judge —

MR. DOSS: Sounds pretty legit.

THE COURT: That's okay.

All right. And then Mr. Hicks.

MR. DOSS: Kind of the same for school.

MR. MOLCHAN: I don't have a problem for cause with him, Judge.

THE COURT: Okay. So cause Mr. Hicks. And Ms. Swanson was nice enough to make other accommodations. So now we're dealing with the second row. So that's fine. Send in the next one.

SECURITY OFFICER: Ms. Evans.

THE COURT: That's fine. Actually, it was Ms. Smith.

(Prospective juror at the bench)

THE COURT: Hi there. You're Ms. Evans.

PROSPECTIVE JUROR: Yeah.

THE COURT: Hi, Ms. Evans. This is Juror Number 21. You had just indicated that you have a conflict.

PROSEPCTIVE JUROR: Yes.

THE COURT: And we're just asking what it is.

[88] PROSEPCTIVE JUROR: I work at a school, and I'm tutoring students who are struggling before next month's FCAT after school.

THE COURT: I guess I'm going to ask a couple of questions. When is after school?

PROSPECTIVE JUROR: 2 o'clock. The tutoring is from 2 to 3:15.

THE COURT: Is it everyday?

PROSEPCTIVE JUROR: It's Mondays, Tuesdays, and Thursdays.

THE COURT: All right. Forgive me for asking this: Obviously, this is an important thing, and I want to make sure that everyone has their day in court, which means I need to impanel a jury. Is this something that you have to do, or is there someone else that perhaps this week can take your place and do it instead of you?

PROSEPCTIVE JUROR: Yes, there could be.

THE COURT: Okay. Now, the next question is:

If you — if I ask you to get someone else to cover for you for Tuesday and Thursday, is it going to be a situation where you're distracted, or do you think you can still can be impartial in this case?

PROSEPCTIVE JUROR: I think I can still be impartial.

[89] THE COURT: Then I'm now going to turn it over to the attorneys. Mr. Molchan, do you have any questions?

MR. MOLCHAN: No questions, Your Honor.

THE COURT: Mr. Doss?

MR. DOSS: No questions. Thank you.

THE COURT: Thank you. And we don't know what we're doing yet, but you'll find out at the end. Thank you.

(Prospective juror excused)

THE COURT: And I thought the first one was Ms. Smith. Apparently not. All right.

(Prospective juror at the bench)

THE COURT: Hi, ma'am. And your name is?

PROSPECTIVE JUROR: Roxie Smith.

THE COURT: Okay. It is Ms. Smith. There you go. Ms. Smith, you had just said that you have a conflict, and we're trying to find out what they are.

PROSEPCTIVE JUROR: It's work-related. I'm a waitress. I'm scheduled a bunch this week.

THE COURT: Okay. I'm going to ask you — believe me I've been asking everybody these same types of questions because a lot of times, of course, work does play into it. Are you daytime, nighttime, both?

PROSEPCTIVE JUROR: It varies.

[90] MR. MOLCHAN: Where do you work?

PROSEPCTIVE JUROR: Sonny's Barbecue. This week I know I work night shifts tomorrow and Wednesday.

That starts at 3:30. And Thursday I'm 10 to 5.

THE COURT: Okay. Is there — is there anybody, maybe, that could switch and could work —

PROSEPCTIVE JUROR: I can see if people can swap my shifts. If not, I can get the managers to get it covered for me, if I have to.

THE COURT: And then I'm going to ask another question, too, and then, of course, I'll give the attorneys a chance to ask. But if it does end up that you are on the jury and someone else has to cover, are you going to be frustrated or distracted, or do you think you can still be impartial?

PROSEPCTIVE JUROR: No, I'll still be impartial.

THE COURT: Mr. Molchan?

MR. MOLCHAN: No questions.

THE COURT: Mr. Doss?

MR. DOSS: No questions. Thank you.

THE COURT: Thank you so much.

(Prospective juror excused)

THE COURT: I think that's all for Row 2, then. Those two are okay.

[91] (Prospective juror at the bench)

THE COURT: So now we'll go — come on in, ma'am. Are you Ms. Bell?

PROSEPCTIVE JUROR: Yes.

THE COURT: Hi. Come on up, Ms. Bell.

PROSEPCTIVE JUROR: How are you?

THE COURT: Hi. You had just said that you had, had a conflict, so we're now, kind of, sorting that out.

PROSEPCTIVE JUROR: My sister-in-law died yesterday, and I know there's going to be —

THE COURT: I'm so sorry.

PROSEPCTIVE JUROR: — a service this week, but I don't know what day. And I don't know that I'd be excused to go if I'm on the jury.

THE COURT: All right. Mr. Molchan?

MR. MOLCHAN: No questions, Your Honor.

THE COURT: Mr. Doss?

MR. DOSS: No questions.

THE COURT: I'm sure I speak for everybody here when I tell you I'm very sorry. Take care. Step back out.

PROSEPCTIVE JUROR: Am I excused to go?

THE COURT: No, no. I can't be that nice. Not yet.

[92] (Prospective juror excused)

THE COURT: Are you Ms. O'Daniel-Lopez?

PROSPECTIVE JUROR: Yes.

THE COURT: Hi. All right. You had just indicated that you had a potential conflict, and I'm here to find out what it is.

PROSEPCTIVE JUROR: Tuesdays, Thursdays my husband has evening classes. He's a full-time student, so I have custody of our child who's under five.

THE COURT: And I've asked everybody questions like this, but if you were selected to be on this jury, is there somebody, maybe, that could look after your child just during those particular times?

PROSEPCTIVE JUROR: Yes.

THE COURT: I have to ask further. If you are selected to be on the jury, would the fact that you would have had to get somebody to care for your child, would that make you frustrated or in any way leave you — we're looking for people to be impartial. So do you think that, that would frustrate you, or do you think you can be impartial?

PROSPECTIVE JUROR: I can be impartial.

THE COURT: Mr. Molchan?

MR. MOLCHAN: No questions.

THE COURT: Mr. Doss?

[93] MR. DOSS: No questions. Thank you.

THE COURT: Thank you very much.

(Prospective juror excused)

THE COURT: Ms. Boyden, hi. Come on up. All right. You had just indicated that you had a conflict, so what we're trying to do is find out about it.

PROSPECTIVE JUROR: It's only Wednesday night. That's the only thing I have a conflict with.

THE COURT: What's the conflict?

PROSPECTIVE JUROR: I'm a director of the Christian education at the Christ Episcopal Church, and we're in our Lent dinner service, and I'm in charge of adult, children, youth, sound equipment, you name it, and I actually teach a class. So if there's any other night that could run late, I can stay, but Wednesday night, I called the director and I said, what do I need to do? And he said, just be honest with her. You'll abide by whatever you said. And he said it would put a tremendous hardship on him if I wasn't there.

THE COURT: Well, that was exactly going to be my next question. Because a lot of times folks have conflicts, but with a little wiggle room they can get somebody else to cover them or somebody else to help, and that's what I was going to ask. So you did call —

PROSEPCTIVE JUROR: I did call the director, [94] yes, sir (sic). I said, please tell me how you feel about it. Because her decision will be final. But how do you feel if I was not there? I didn't discuss anything, other than I might not be able —

THE COURT: What time does it start?

PROSEPCTIVE JUROR: It starts at five, which is dinner first, which I could miss — or 5:15. But by six, we're into our programs, and I'm setting — like I said, I have to do a lot of the media. And then as everyone disperses, I make sure all of the programs are running. And then I actually teach the children's program. And so —

THE COURT: And, unfortunately, like we said, Wednesday night is the only night that we anticipate running long.

PROSEPCTIVE JUROR: Because I don't have a problem with anything else, so whatever your decision is, we totally respect.

THE COURT: Okay. Mr. Molchan?

MR. MOLCHAN: No questions, Your Honor.

THE COURT: Mr. Doss?

MR. DOSS: No.

THE COURT: Thank you, ma'am, so very much.

(Prospective juror excused)

THE COURT: And then after Mr. Rourke, if [95] you'll just hold up for just a moment.

(Prospective juror at the bench)

THE COURT: Hi, sir. You had just indicated that you have a conflict.

PROSEPCTIVE JUROR: Yeah, I do. I've been watching my granddaughter for the last week and all this week because they have a problem with the day-care center where they're at, and being tied up for three straight days, I — you know, I'm the one that's not working in the family. That's why I got stuck with

her. One day wouldn't be bad. It'd be just — you know, my daughter had to take off today to stay home with her. And that and the fact they only got one vehicle and my wife still works. So it really makes it tough getting downtown and back everyday.

THE COURT: And I'm going to ask — and I've been asking everybody the same types of questions. So is what you're telling me is there isn't anybody else to keep your granddaughter?

PROSEPCTIVE JUROR: Exactly. My daughter would have to stay home from work, which, you know, she can't stay home from work, or my son-in-law would have to. So since I'm retired on Social Security disability, they asked me to take her until they can get her into a different daycare center.

[96] THE COURT: Mr. Molchan?

MR. MOLCHAN: No questions, Your Honor.

THE COURT: Mr. Doss?

MR. DOSS: No questions, Judge.

THE COURT: Thank you, sir.

You're not excused, but that's all the information I can give you at this time.

(Prospective juror excused)

THE COURT: Let's start with Number 27. Cause or not?

MR. DOSS: Yes.

MR. MOLCHAN: Yes.

THE COURT: The sister-in-law died.

MR. MOLCHAN: I think that's —

THE COURT: All right. Then let's go to Ms. Joelle O'Daniel-Lopez that said she could make arrangements. So that's fine.

Ms. Boyden is the one that is teaching the church program that evening.

MR. MOLCHAN: I don't have a problem with a cause strike on her.

MR. DOSS: I was going to say cause.

MR. MOLCHAN: Only asking the one day. I think she wanted to serve, but I don't think she should.

[97] THE COURT: And Timothy Rourke, the one that has no one else to keep his grandchild.

MR. MOLCHAN: I'd say cause, Judge.

MR. DOSS: I don't have a problem either way, Judge. I'll abstain on that one. I don't have an opinion one way or another.

THE COURT: You want it for cause?

MR. MOLCHAN: I'd move for cause, Judge. I don't think he's trying to —

THE COURT: All right. Now, we have virtually everyone on the fourth row. So let's start.

SECURITY OFFICER: Ready?

THE COURT: Yep.

(Prospective juror at the bench)

THE COURT: All right. And you are not Ms. Mezick. So you are Mr. Cangelosi. How do you say it?

PROSEPCTIVE JUROR: Cangelosi.

THE COURT: Cangelosi. Sorry about that. All right. You had stated you have a conflict. We just need hear what it is.

PROSEPCTIVE JUROR: Well, I'm a solo practitioner attorney, and I don't even have a secretary right now. So shutting down for a week would be a substantial hardship.

[98] THE COURT: Okay.

PROSEPCTIVE JUROR: That's it.

THE COURT: I don't think we've met. Have we met? And if so, I apologize.

PROSEPCTIVE JUROR: Probably not. I still practice mainly in Louisiana. My wife's a federal judge. That's why I live here. Lizzy Timothy.

THE COURT: Oh, you're kidding?

PROSPECTIVE JUROR: I'm not.

THE COURT: She's a sweetheart.

PROSEPCTIVE JUROR: My practice is still mainly in Louisiana. I'm back and forth a lot. I don't keep much of an office here, but I'm still working, kind of, remotely. So that's my situation.

THE COURT: Mr. Molchan, any questions?

MR. MOLCHAN: No questions.

THE COURT: Mr. Doss?

MR. DOSS: No.

THE COURT: All right. Thank you, sir.

PROSPECTIVE JUROR: Just wait outside.

(Prospective juror excused)

(Prospective juror at the bench)

THE COURT: All right, Mr. Brackens. You had stated that you have a conflict.

PROSEPCTIVE JUROR: I do.

[99] THE COURT: And so it is?

PROSEPCTIVE JUROR: My kids, I take them to school and pick them up from school. My father, he's 86 years old. There's times I have to go and check on him, too. And I'm self-employed, so works been a little slow, and I got work coming in. So, you know, I'm the breadwinner in the house. So that's my conflict that I have.

THE COURT: Okay. And I've been asking these questions, these types of questions to everybody, but as it relates to your children, is there nobody else that could do it during this — just this week?

PROSEPCTIVE JUROR: The problem is my wife, she works, too. So, I mean, she holds a position at her job, and I've been mainly having to pick them — take them and pick them up. It put a strain on us this morning for her to get them to school and picking them up this afternoon. So if I had to, I might not could, but then there's money costs, too, of having to pay somebody to do this.

THE COURT: How are you self-employed? What do you do?

PROSEPCTIVE JUROR: Electrical.

THE COURT: And you're saying that you do have work this week?

[100] PROSEPCTIVE JUROR: Yes, I have work this week. But it's been a little slow, but I have — mat-

ter of fact, at lunch break, I went and looked at something, so I picked up on it.

THE COURT: Mr. Molchan, anything?

MR. MOLCHAN: Mr. Brackens, would the fact that you'd miss work, would that cause you a financial inconvenience?

PROSEPCTIVE JUROR: Yeah.

MR. MOLCHAN: I just want to get on the record that, that's certainly going to cause a problem?

PROSPECTIVE JUROR: Yes.

THE COURT: Mr. Doss?

MR. DOSS: No questions, Judge.

THE COURT: Thank you, sir. Just go ahead and step on out.

(Prospective juror excused)

(Prospective juror at the bench)

THE COURT: Are you Mr. Kilgo?

PROSEPCTIVE JUROR: Kilgo.

THE COURT: Kilgo. Sorry about that.

PROSPECTIVE JUROR: That's okay. I get it all the time.

THE COURT: All right. You had stated that you have a conflict?

[101] PROSPECTIVE JUROR: Yes, ma'am.

THE COURT: And it is?

PROSPECTIVE JUROR: Going to Europe with my wife for our anniversary on Friday evening.

THE COURT: Oh, wow.

PROSPECTIVE JUROR: So it's a pretty big one. She might not be too happy.

THE COURT: Oh, you mean you can't catch up with her on Saturday?

PROSEPCTIVE JUROR: I don't believe she'd be too happy with that, but we can try.

THE COURT: All right. Well, counsel, I will let you — because I don't know the length of your — you anticipate this going into Friday?

MR. MOLCHAN: Potentially.

MR. DOSS: We could end up being in deliberations on Friday afternoon.

THE COURT: All right. That's fine. And I'm not excusing anybody yet. I'm just hearing the reasons.

All right. Any questions, Mr. Molchan?

MR. MOLCHAN: Not from me.

THE COURT: Mr. Doss?

MR. DOSS: No.

THE COURT: Thank you, sir. Go ahead and step [102] out.

(Prospective juror excused)

(Prospective juror at the bench)

Hi, Ms. Denham.

PROSEPCTIVE JUROR: Shipman.

THE COURT: Oh, I'm sorry. I skipped one.

Karen Shipman, Number 40. Hi, ma'am. You indicated that have a conflict.

PROSPECTIVE JUROR: Yes.

THE COURT: And we're just trying to hear what they are now.

PROSEPCTIVE JUROR: Strictly work-related.

I'm a financial specialist at Chris Plant. The first week of the month is our close-out for February. And I don't know how I would do it. I could go in after I leave here and work. That's an option. It would just be difficult.

THE COURT: Well, I've been asking — most people, their difficulties are work because I know this is an inconvenience and a hardship, but is there not anybody that could cover for —

PROSEPCTIVE JUROR: There is someone. I would still have to go in at night and get the stuff ready for them to do the next day, but I could do that.

THE COURT: And you know I'm going to have to [103] ask some more questions. Because if what you're talking about is going in at six and working til midnight —

PROSEPCTIVE JUROR: Oh, no. Maybe a couple of hours each night.

THE COURT: All right.

PROSEPCTIVE JUROR: It's doable.

THE COURT: Well, that's what I'm going to ask. Because we don't want you to be tired to the point that you would be distracted. We don't want you to be frustrated to the point that you would be distracted. But, of course, if there was any way that we could do this, obviously, I want to give these gentlemen the broadest

spectrum of folks to choose from. So is this something that perhaps can be worked out, if necessary?

PROSEPCTIVE JUROR: Yes. I would say yes, if necessary. It would be difficult, but I could work it out.

THE COURT: Mr. Molchan?

MR. MOLCHAN: We're probably going to be working late on Wednesday evening. We talked about that a little bit. I just wondered how that would impact in your situation.

PROSEPCTIVE JUROR: I could do what has to be [104] done tomorrow night, Tuesday night.

MR. MOLCHAN: And the question is, again, we want you to be fully prepared and attentive. And only you can answer that question.

PROSEPCTIVE JUROR: I can do that.

MR. MOLCHAN: I don't have any questions.

THE COURT: Anything?

MR. DOSS: None. Thank you.

THE COURT: Thank you very much.

(Prospective juror excused)

(Prospective juror at the bench)

THE COURT: All right. Are you Ms. Denham?

PROSPECTIVE JUROR: I am.

THE COURT: Okay. You had stated that you have a potential conflict.

PROSEPCTIVE JUROR: Well, it's with the late evening. My husband is in Tampa for work this week, and I'm the only one that can pick up and drop off my one year-old at daycare.

THE COURT: Well, you just beat me to the punch on the question. Because — and I don't know what late is for you.

PROSEPCTIVE JUROR: 6 o'clock.

THE COURT: I can tell you that it appears that Wednesday night, because we did have some witness [105] issues, we probably will be going until maybe 6:30 or 7. But that's the only night that I anticipate being able to — being late. Is there anybody that could cover for you that one day?

PROSPECTIVE JUROR: If it's not too late, my husband's mom, grandmother, lives here, and she had spine surgery back in the end of 2011. So she's really stiff in picking him up and stuff like that. If it's not too late, she can handle him for a few hours, but not too long.

THE COURT: We anticipate — I mean, maybe seven, something like that.

All right. And let me take this one more. Because, obviously, you know, I'm trying to make sure these folks have as broad a spectrum of folks to choose from as they can. If you do end up on the jury, are you going to be frustrated in any way that would make you not be impartial.

PROSEPCTIVE JUROR: No. I've served before, and I feel it's my civic duty.

THE COURT: Thank you very much. Counsel, no questions?

MR. MOLCHAN: No questions.

PROSEPCTIVE JUROR: Oh. Sorry.

THE COURT: That's okay. I was motioning.

[106] (Prospective juror excused)

(Prospective juror at the bench)

THE COURT: All right. I've written all over my sheet. Are you Mr. Stambolic?

PROSPECTIVE JUROR: Yes, ma'am.

THE COURT: You had indicated that you have a conflict.

PROSEPCTIVE JUROR: Yes. I've been working in New Orleans. I live here, of course. And I have a deadline at work that's coming up on the 13th. I should be there right now, but I didn't want to miss this. And I can't — if I miss the next four or five days, I'll lose my contract with them.

THE COURT: What do you do?

PROSEPCTIVE JUROR: I work for Circle K, gas stations, and they just bought 35 of them and remodeling them all. And I got an opportunity to be involved in it. And the deadline is coming up the 13th, when it's all going to be finished. If I do miss any of it, I'll miss a lot of my income to pay my bills. If it was any time after that, I would love to do it. I don't have no — I'm not objecting doing it. It's just the timing is terrible.

THE COURT: Understood. Mr. Molchan?

MR. MOLCHAN: No questions.

[107] THE COURT: Mr. Doss?

MR. DOSS: None. Thank you.

THE COURT: Thank you very much. If you'll step back out.

(Prospective juror excused)

(Prospective juror at the bench)

THE COURT: You are Mr. Moye?

PROSPECTIVE JUROR: Yes.

THE COURT: Hi there. You had indicated you have a conflict. We are just trying to hear what it is.

PROSEPCTIVE JUROR: Well, I have several things. I have global meetings with my employees over the globe Tuesday, Wednesday, and Thursday mornings that were already scheduled. I didn't know this would be something doing during the week. And secondly, I have a medical procedure on Friday that I have to prep for Thursday. Other than that, I have — it's not a conflict, but it's just a concern about the situation for me, whenever you want to talk about it.

THE COURT: All right. Well, first of all, let's go through the first two. As far as the meetings, what do you do for a living?

PROSPECTIVE JUROR: I'm a product safety person. We have global — I have people answer to me [108] across the globe living at their workplaces there, and I have meetings — I have their personal development plans this week.

THE COURT: And I've been asking everybody these same types of questions, but in the event that it — that you were on the jury, would it be something that someone else could cover for just these few meetings?

PROSEPCTIVE JUROR: No, I'd have to do some — not really. My boss who could is in China doing plant setups over there. So this is not a good time.

THE COURT: All right. And I really am sorry for this next one, but I have to make a record of everything. What type of medical procedure on Friday?

PROSEPCTIVE JUROR: It's a colonoscopy.

THE COURT: When you said you were prepping Thursday, I pretty much figured what you were doing.

PROSPECTIVE JUROR: I had a bad checkup last year, and I'm supposed to do it one year, so it was all set up earlier.

THE COURT: Okay. Mr. Molchan?

MR. MOLCHAN: I have no questions.

THE COURT: Mr. Doss?

MR. DOSS: Nothing but sympathy.

THE COURT: Thank you. If you'll just step [109] out, please.

(Prospective juror excused)

(Prospective juror at the bench)

THE COURT: Are you Ms. Bonnell?

PROSPECTIVE JUROR: Bonnell.

THE COURT: All right. You had said you had a conflict.

PROSEPCTIVE JUROR: I have a dinner for 400 people on Thursday, and taking time away from my staff would really —

THE COURT: You know I have got to inquire into this. What on earth? Either you are the best host in the world —

PROSEPCTIVE JUROR: No, I'm a chef.

THE COURT: Oh, okay. Where are you a chef?

PROSEPCTIVE JUROR: Azalea Trace.

THE COURT: Oh, okay.

PROSPECTIVE JUROR: Right there.

THE COURT: Oh, okay. All right. And I have to ask these questions. Is this a situation where you have a sue chef or there's another head chef or anybody that could stand in for you during — to do this?

PROSEPCTIVE JUROR: They could, but it's going to hurt the team a little bit. Because it's just the number that we work with, you know, the number of [110] people.

THE COURT: And I'm going to have to pin you down a little bit more than that. Because a lot of folks have things going on in their life, and I just have to make sure which ones are true and which ones are, you know — I just need all the information that I can get. So when you said you could but it would hurt the team, does this mean that you really could and you just wouldn't want to do it or —

PROSEPCTIVE JUROR: Well, I mean, they could do it, potentially, but it would be a little bit more of a struggle for them with one person down.

MR. MOLCHAN: And what time is this dinner?

PROSEPCTIVE JUROR: It's from — well, it starts at five, but we start prepping at eight in the morning. Actually, we're starting yesterday, but yeah.

THE COURT: If it was a situation that you actually ended up on the jury, would it be something that you would be frustrated by being on the jury to the point you would be impartial?

PROSEPCTIVE JUROR: No. I think my — the religious and moral would be more of a problem than my job.

THE COURT: I think we're going to get into that a little more, too. We're just taking one of [111] these issues at a time. So right now as it relates to the job, it's something that you really want to be there, if I understood. You do believe that it would be difficult for them, but you do believe that it's something that would be manageable?

PROSPECTIVE JUROR: They can do it. I'm sure.

THE COURT: It's something that — from a job perspective, you could be impartial?

PROSEPCTIVE JUROR: Uh-huh.

THE COURT: All right. Then we'll get to the other issues. Thank you very much.

(Prospective juror excused)

(Prospective juror at the bench)

THE COURT: Are you Ms. Mezick?

PROSEPCTIVE JUROR: Yes.

THE COURT: Hi, Ms. Mezick. You indicated that you had a conflict.

PROSEPCTIVE JUROR: Yes.

THE COURT: What is the conflict?

PROSEPCTIVE JUROR: Health. I'm asthmatic, and I live on a breathing machine at home. I carry medicine with me all the time, too. And I've died once with asthma, and that's my main concern. That's my main concern of not — of having an attack here, disrupting your court and everything.

[112] THE COURT: Let me ask you a couple of questions. Because once we begin this proceeding, eve-

rything is going to be about the jury. I try to cater to you folks as much as possible. If you want to bring food, you want to bring water, I have no problem. Would it be a situation — and I freely admit I don't know what I'm talking about, but your breathing machine, could you bring it into the courtroom if necessary?

PROSEPCTIVE JUROR: Yes. It's a portable one. Well, I have to plug it in.

THE COURT: Would that help you if you these folks decide that they think you would be a great juror?

PROSEPCTIVE JUROR: Yes. Just as long as I can have my medicines on me. I carry a sprayer with me, too. Sometimes that doesn't work, and that's when I rely on my breathing machine. I like to take my breathing machine throughout the day as well. Sometimes I have to take two.

THE COURT: Well, if I were able to make accommodations for you, would that help? Do you think that would remove the problem for you?

PROSEPCTIVE JUROR: As long as I can have access to medicine.

[113] THE COURT: Of course, that goes without saying.

PROSPECTIVE JUROR: Here's another thing, Judge, I want to ask you about. I'm very much against the death penalty, and going into something like with it's death or life — and I understand you would go over all the details of the case and everything, but I'm still strictly against death. So it would be —

THE COURT: Well, and that is something that these folks have to take into consideration as well.

PROSPECTIVE JUROR: I just wanted to bring that up to you.

THE COURT: I remember you had answered Mr. Molchan's question that morally you didn't feel comfortable on this type of case, and they've been taking good notes. But we just tackle one issue at a time.

PROSEPCTIVE JUROR: Okay.

THE COURT: Thank you.

(Prospective juror excused)

(Prospective juror at the bench)

THE COURT: Hold up before you bring in the next one.

All right. Let's go down the list. What about Mr. Cangelosi?

[114] MR. MOLCHAN: I'd ask for cause.

THE COURT: The attorney.

MR. DOSS: That's fine.

THE COURT: Mr. Brackens.

MR. MOLCHAN: Ask for cause on him.

MR. DOSS: He's the self-employed —

MR. MOLCHAN: He's the self-employed electrical guy.

THE COURT: The next is Mr. Kilgo that's going on his anniversary.

MR. MOLCHAN: I'll join — neither one of us want to get in that.

MR. DOSS: He'd be divorced if we don't go for cause.

THE COURT: Could you imagine?

MR. MOLCHAN: Well, I can't imagine going back and having to —

THE COURT: Tell your wife, sorry, sweety, I'll catch you. The next one would be Karen Shipman, and she was the one who made arrangements, so she's okay on those grounds.

Denham is the chef.

MR. MOLCHAN: No, she's the one year-old.

THE COURT: That the husband is out of town. Sorry about that. And she said she could make [115] arrangements.

Then we have Mr. Stambolic, who is the New Orleans gentleman.

MR. MOLCHAN: I think he's got —

THE COURT: You folks agree to cause?

MR. MOLCHAN: Yes.

MR. DOSS: Yes.

THE COURT: Mr. Moye is the one with the colonoscopy.

MR. MOLCHAN: Well, having been there, done that, and he had a bad one —

THE COURT: That's my concern.

MR. MOLCHAN: He had a bad one.

MR. DOSS: He needs to be there.

MR. MOLCHAN: I'm not going to get in his way.

THE COURT: Ms. Bonnell, actually —

MR. MOLCHAN: That's the chef.

THE COURT: And as far as the conflict, no cause, correct?

MR. MOLCHAN: I don't think so.

THE COURT: All right. The next would be Ms. Mezick with the health issues. Unless you folks want to argue, I believe that's no cause.

MR. MOLCHAN: I think there's going to have other problems, but that's —

[116] MR. DOSS: I don't think she goes for cause on this one.

THE COURT: We're just talking conflict of the week.

Now, if you could bring in the last row.

(Prospective juror at the bench)

THE COURT: Come on up, ma'am. Ms. Roman?

PROSPECTIVE JUROR: Yes.

THE COURT: So you stated that you had a conflict.

PROSEPCTIVE JUROR: Yes, ma'am.

THE COURT: And it is?

PROSEPCTIVE JUROR: I'm an accountant. I have tax reserves due for two companies next Wednesday. And I'm not going to have time to spend a whole week here and get that done as well.

THE COURT: Okay. And I've been asking these questions of everyone just to sort through the details. So are you sole —

PROSEPCTIVE JUROR: I'm the sole person.

THE COURT: Solo practitioner?

MR. MOLCHAN: No, I work for a life insurance company.

THE COURT: Then I guess my question was, is there nobody at work that can cover for you or for help [117] —

PROSEPCTIVE JUROR: No, ma'am. There's another girl that does the same thing, but she does it for other companies. So she's got the same load I do. I can make up two days, but I can't make up five. I've got this weekend to make up, but that's it.

THE COURT: Mr. Molchan?

MR. MOLCHAN: No questions, Your Honor.

THE COURT: Mr. Doss?

MR. DOSS: No question, Judge.

THE COURT: Thank you so much, ma'am.

(Prospective juror excused)

THE COURT: All right, is this Ms. Whitehurst?

PROSEPCTIVE JUROR: Yes.

THE COURT: Hi, ma'am. You had indicated that you had a conflict.

PROSPECTIVE JUROR: I do.

THE COURT: And it is?

PROSPECTIVE JUROR: I am transitioning from one job to another, and this is my last week with my current employer where I'm supposed to be training them, and I also have training for my new job this week.

THE COURT: Okay. What are you at now, and I guess what are you going to?

[118] PROSEPCTIVE JUROR: I'm going into real estate. I have a real estate orientation class this week at PAR, and I work for a consulting and creative firm.

THE COURT: Okay. Is there anybody that could cover your exit from the company that would train them other than you?

PROSEPCTIVE JUROR: No.

THE COURT: Okay.

PROSPECTIVE JUROR: I'm really passing on some details on notes on current work to them.

THE COURT: Mr. Molchan, anything?

MR. MOLCHAN: No, Your Honor.

THE COURT: Mr. Doss.

MR. DOSS: No, thank you, Judge.

THE COURT: Thank you, ma'am.

(Prospective juror excused)

(Prospective juror at the bench)

THE COURT: And then Mr. Faircloth.

PROSEPCTIVE JUROR: Yes, ma'am.

THE COURT: You had indicated that you have a conflict.

PROSEPCTIVE JUROR: Yes.

THE COURT: And?

PROSPECTIVE JUROR: Wednesday I'm a youth [119] minister at my church, and I'm also the youth worship leader. So Wednesdays I have band to do and also to be there for the youth.

THE COURT: Okay. All right. And what church are you at?

PROSEPCTIVE JUROR: Charity Chapel.

THE COURT: Is — on this one Wednesday night, would there not be — I mean, if you got sick, would there not be somebody that could step in and cover for you just under these unusual circumstances?

PROSEPCTIVE JUROR: There would be people that could, yes.

THE COURT: Okay. So then my next question would be, if I make the decision that you are an appropriate person to be on this jury, would you be frustrated to the point that you would not be able to be fair and impartial?

PROSEPCTIVE JUROR: No, ma'am.

THE COURT: Okay. Mr. Molchan?

MR. MOLCHAN: No questions, Your Honor.

THE COURT: Mr. Doss?

MR. DOSS: No, thank you, Judge.

THE COURT: Thank you, sir.

(Prospective juror excused)

THE COURT: We look at these folks. Coming [120] down, Ms. Roman. Cause?

MR. DOSS: Yes.

MR. MOLCHAN: Ms. Roman?

THE COURT: Roman was the accountant.

MR. MOLCHAN: Yeah, I think that's fine.

THE COURT: The next would be Whitehurst, which is transitioning out and transitioning in.

MR. MOLCHAN: That's a close one.

MR. DOSS: That's rough.

MR. MOLCHAN: There's something about it that —

THE COURT: Do you want to hold off?

MR. MOLCHAN: Left's hold off on her.

MR. DOSS: I agree. It didn't seem cause-worthy.

THE COURT: That's — we'll leave her up in the air, and we'll see how we get with strikes and the such. Then we have Mr. Faircloth.

MR. MOLCHAN: Or Farrington?

THE COURT: Faircloth was the youth minister, who was the last one.

MR. DOSS: I think he said he could make arrangement if he had to.

MR. MOLCHAN: I think he's fine. I think for the purposes of that.

[121] THE COURT: That's fine. Then he's not for cause. Now, hopefully, you folks have a better idea as far as — I have 30. So we're still two down. And also — well, we're actually more down than that because of the fact of alternates.

MR. DOSS: We had several people on the death penalty issue indicated one way or the other that they weren't going to be able to put that aside. I know we haven't dealt with it yet.

THE COURT: I counted those in, at least for my notes. I took the worst possible scenario. And, again,

my notes may not match with yours, but I have 30 people at least at this point in time that are still viable. But you have 12, 10, and 10. So you're looking at 32. So if you use all your strikes. And then we have alternates, and then, of course, you each get unlimited for cause, but one strike each for alternate. And I would want at least one alternate on the panel. So that's potentially another three. So we are down, folks. I don't know whether you want to forge ahead at this point in time. I know we still have a pool of now 13.

MR. MOLCHAN: Judge, I'd like to keep moving at least —

THE COURT: That's fine.

[122] MR. MOLCHAN: I mean, it may be just by process of elimination we get to a point, you know —

THE COURT: You folks may find the first 12 make you as happy as can be.

MR. MOLCHAN: Well, that's what I'm thinking. Just go ahead and keep pressing on.

THE COURT: I think that would be a wonderful thing.

MR. MOLCHAN: Although I would say this: How late do you expect to keep moving? Because we're going to need time depending upon what happens to get people — we have a number of people set up, but you know —

THE COURT: I am anticipating, Mr. Doss, maybe an hour?

MR. DOSS: Depending on their answers. And, Judge, the only other thing is we haven't brought in the people for the death qualifications, as far as the ones that indicated that they were strong one way or anoth-

er. I would imagine that would take another 30 minutes to an hour, depending on where that goes. So I think we're probably looking at an hour and a half or two before we get to the strike process. I don't know how that factors in. I'm away from home. I'll stay here all night.

[123] THE COURT: We got to get a jury picked, and I'm not going to bring that panel back. So I know your difficulties with tomorrow, but we're forging ahead tonight.

MR. MOLCHAN: Because I can just add somebody to — as far as starting tomorrow, what time do you want to start?

THE COURT: You tell me. You know your case better than I do.

MR. MOLCHAN: Well, I just —

THE COURT: 8:30, 9?

MR. MOLCHAN: I'd say 9 is —

THE COURT: No earlier than 8, no later than nine.

MR. MOLCHAN: I'd say 9, Judge.

THE COURT: 9 o'clock it is, then. We'll see if we can't get a jury.

MR. DOSS: Can I have Mr. Hurst moved, Judge?

THE COURT: Of course.

All right. If you will, bring the panel back in.

(Panel present)

SECURITY OFFICER: Panel is seated.

THE COURT: Let the record so reflect.

Sorry, folks, but I decided while y'all were [124] out there and able to stretch your legs and walk around we would take care of an issue instead of having you sit here and just stare at us while we were taking care of matters. So we've done that.

Mr. Doss, I'm going to turn it over to you.

MR. DOSS: Thank you, Judge.

Good afternoon. Hope everybody is doing well. I get the unenviable position of getting to ask you questions at 4:30 on a Monday afternoon, but if you work with me here, maybe we can work through this a little bit. I have some questions that I'd like to touch upon as we decide who it is that stays and who it is that goes. And I was very pleased to see so many people being forthcoming. As you can imagine, it's a very important process both for Mr. Hurst and for the State. And so as we're asking — as we're asking these questions, I just ask that you please, please really thoughtfully consider the questions that we pose so that you can give us an answer. Because I know a lot of times we ask questions that you might not have thought about or you might not have thought about in a long time or maybe as you're sitting here your thinking process is changing a little bit.

Mr. Molchan spoke a little bit about in these kinds of cases you're here and this is going to be a [125] penalty phase — what we call a penalty phase jury that decides whether or not that they're going to come back and say either life or death as it regards to Mr. Hurst. So when we're talking about that and we're talking about this case, a lot of times I get up here and I start talking about presumption of innocence. We have a little bit of a different twist here, and I want to ask a few people some questions about it just to, kind of, see

where you're at and whether you agree with something or not. And that's that — does everybody understand that the presumption here, instead of being presumed innocent, you're to presume that Mr. Hurst receives a life sentence until the State comes forward with some aggravation? Understanding that, is there anybody that really has an issue with that, that we presume that it's a life sentence?

How about you, Mr. Hall?

PROSEPCTIVE JUROR: No, sir. No, sir, wouldn't have an issue with it.

MR. DOSS: Okay. Okay. How about you, Mr. Smith?

PROSEPCTIVE JUROR: (Nodded head)

MR. DOSS: No. Sometimes I think it's a better way to ask it this way: If I were to ask you right now and say you were chosen to be a juror on this [126] case and we sent you back immediately to the jury room and you had to come back and you had to render a verdict as to what it is that your decision was, life or death, what would it be right now, Ms. Preston?

PROSEPCTIVE JUROR: I couldn't tell you.

MR. DOSS: Okay. How about you, Ms. Swanson?

PROSEPCTIVE JUROR: It would have to be life, if no evidence has been presented.

MR. DOSS: Right. Right. That's exactly right. If you're sent back now, because it's presumed that way, it would have to be life because nothing has been presented. It's, kind of, a simplistic, kind of, explanation, but at the same time, I use that just because I think a lot of times we think of these terms in our head, but when we put them into action, it's a little bit different.

Now, Ms. Lucas, do you think that that's fine, as far as that presumption, that we presume that there's a life sentence until Mr. Molchan comes and brings some kind of aggravation forward?

PROSEPCTIVE JUROR: Yes.

MR. DOSS: Because I know sometimes people think it should be a different way, and it's not just whether you want it to be a different way, is whether you would try to force your way over what — as opposed [127] to what Judge Nobles instructs. Is there anybody that thinks they feel so strongly it should be a different way that they couldn't listen to the instructions by the Judge as to what the presumption is?

Yes, sir, Mr. Mauldin, right?

PROSEPCTIVE JUROR: Correct.

MR. DOSS: You think you would have —

PROSEPCTIVE JUROR: Yeah, I do.

MR. DOSS: Okay. Anybody else? And I appreciate you being so honest, Mr. Felty.

Anybody else?

PROSEPCTIVE JUROR: I answered earlier that I didn't know.

MR. DOSS: But you're in the not-sure camp, right?

PROSPECTIVE JUROR: I'm in the not-sure camp —

MR. DOSS: Understanding that you're not sure, that's why the question is, is whether you're — I'm not saying — I'm not trying to get you committed one way or another to what your vote is. It's more going in do you have a preconceived idea that's going to be just one

way regardless. I think that's more of the question. See, what I'm saying, Mr. Smith?

PROSEPCTIVE JUROR: The weight — I mean, when [128] I woke up this morning, I did not know that I was coming to something like this, and the weight that the decision is what I don't think I could — nobody wants to render a decision on something like this either way.

MR. DOSS: I appreciate your candor with that because I can tell you somebody that sits on this side of the table and you hear, whether it's Mr. Molchan or Judge Nobles or any of us, and we start talking about a death penalty case, I see everybody's eyes get big. Because when you came here today, you didn't necessarily think that we would be asking these questions or asking you to sit on a jury such as this.

Now, Mr. Moye, I know you said you're not sure. Is it similar to Mr. Smith's, or is it a little bit different?

PROSEPCTIVE JUROR: No. I have some predetermined feelings about this, the death penalty.

MR. DOSS: Okay. Okay. We'll address that a little bit later. Thank you.

Kind of tie it in a little bit with what I was addressing as far as that we presume, as we sit here right now, that Mr. Hurst receives a life sentence. It's the State's burden to come forward with the aggravation. I think that when Ms. Swanson answered her question she indicated that she hadn't heard any [129] aggravation. And a lot of times we talk about burden of proof and you hear that on TV shows, I know, and different things, but I know some people might think that it should be a different way.

Mr. Prevatte, do you have any problem with the fact that the burden rests on the State to come forward with this aggravation as opposed to Mr. Hurst having to prove that you should give him a life sentence?

PROSEPCTIVE JUROR: No, sir.

MR. DOSS: Okay. What about you, Ms. Shipman?

PROSEPCTIVE JUROR: I do not have a problem.

MR. DOSS: No problem at all with that?

PROSEPCTIVE JUROR: Not with that.

MR. DOSS: Okay. I guess the question is that I probably could — instead of going around and asking who doesn't necessarily have a problem with it, does anybody think that for some reason Mr. Hurst should have to come forward and prove that he gets a life sentence instead of the State coming forward with the aggravation towards a death sentence? Does anybody think that? Okay. That short circuits that.

Now, I could tell you without going into any of the details, in a case such as this, you're going to hear from some psychologists, from some various doctors as to Mr. Hurst, in his mental capabilities. Is **[130]** there — does anybody have any issues particularly with psychologists.

Mr. O'Steen?

PROSEPCTIVE JUROR: No.

MR. DOSS: No?

PROSEPCTIVE JUROR: No.

MR. DOSS: How about you, Mr. Anderson? You think you could just weigh their testimony like anybody

else? I mean, you don't have any preconceived notions one way or the other?

PROSEPCTIVE JUROR: No, sir.

MR. DOSS: How about you, Ms. Phelps?

PROSEPCTIVE JUROR: No.

MR. DOSS: Mr. Mauldin?

PROSEPCTIVE JUROR: (Nodded head)

MR. DOSS: Whenever we're talking — whenever we're talking about the psychologist or the psychiatrist or anybody like that, Mr. Molchan had mentioned about mitigation, which is sometimes, I think, we hear these words and we think we know what they mean or maybe we haven't thought about them a lot and we start thinking about what's that really mean. It's just something that waives in favor of giving a life sentence to Mr. Hurst. Obviously, that's things that we're going to want to talk about and we're going [131] to want to present to you. When we're talking about mitigation, we're talking about issues of culpability. We're talking about issues of responsibility. And I think this might tie into some people's thoughts that they have on capital punishment when we were asking whether you could put certain things aside.

But let me ask it this way: I'm going to give you an analogy. If I have a situation where I walk into my — I walk into my home and I look around and there's something broken in my home and I got a son that's 24 and I got a son that's 21 and I got a son that's 10 and I go in and something's broken in my home and I start trying to find out who it is that broke whatever item it is in my home, do you think I should judge that person on — each one of my sons equally in a situation like that with a range from 10 to 24?

How about you, Ms. Shipman?

PROSEPCTIVE JUROR: No.

MR. DOSS: Why not?

PROSEPCTIVE JUROR: Because of the age. The ten year-old wouldn't have the experience that an older child would.

MR. DOSS: Okay. What about you, Ms. Denham?

PROSEPCTIVE JUROR: I'll tell you, no, for a fact which one did it. You can't really place the [132] blame on any of them.

MR. DOSS: Okay. Let's say I'm not going to tell you which one did it. We're not trying to figure out which one did it. Let's say at different times, regardless of who did it, if I tell you the 24 year-old did it, are you going to judge that differently than if I told you the 10 year-old did it?

PROSEPCTIVE JUROR: I guess I'm confused on the question. I've got to judge which one did it or the judgment to that child?

MR. DOSS: How am I going to hold them — what level of responsibility am I going to hold them at with the 10 year-old as opposed to the 24 year-old?

PROSEPCTIVE JUROR: Well, I mean, let's say the punishment was grounding. You can't ground a 10 year-old the same way you can a 24 year-old. A 24 year-old can go out and do stuff. A 10 year-old sits at home all day, anyway. So, yeah, it's going to be different depending upon —

MR. DOSS: So the punishment is going to depend upon that particular person's age?

PROSEPCTIVE JUROR: In that situation, yeah.

MR. DOSS: Or maybe even, I think Ms. Shipman was getting into what can we hold them responsible for? What's their life experience? Would you agree with [133] that, Mr. Faircloth?

PROSEPCTIVE JUROR: I mean...

MR. DOSS: Do you think the 10 year-old and the 24 year-old should be judged by the same standard as far as their responsibility for an action such as that?

PROSEPCTIVE JUROR: (Nodded head)

MR. DOSS: So now, despite my simplistic analogy, I think when we're talking about aggravation and mitigation, that's the kind of things that we're getting into as far as what level should we hold that person responsible to. Does anybody — and I'm not going to ask you to expound on this, but does anybody think that we shouldn't go into that and decide what kind of responsibility somebody has based upon their mental capabilities or lack thereof, so to speak?

How about you, Ms. Morgan?

PROSEPCTIVE JUROR: No, sir.

MR. DOSS: No problem with that weighing process, as Mr. Molchan described it?

PROSEPCTIVE JUROR: No. If you can give me the facts of that again real quick —

MR. DOSS: Well, not really — the facts were and the analogy was basically that we're judging different people —

[134] PROSEPCTIVE JUROR: Correct.

MR. DOSS: — based upon their differences in their makeup, whether it be age or mental capabilities or anything like that. The question being, do you have

a problem with that process, not presuming what the result of the process is? That's irrelevant for my question. But do you have a problem with that process, as opposed to, you do this act, you receive this punishment regardless?

PROSEPCTIVE JUROR: No, I don't have a problem with that, what the age difference with the different...

MR. DOSS: Okay. Okay. How about you, Ms. Whitehurst?

PROSEPCTIVE JUROR: No.

MR. DOSS: How about you, Ms. Grantham?

PROSEPCTIVE JUROR: No problem.

MR. DOSS: Does anybody have a problem with that kind of process of getting into that person's particular abilities or not or a person's experiences in determining what punishment would be the fair punishment?

How about you, Mr. Hicks?

PROSEPCTIVE JUROR: Can you repeat it?

MR. DOSS: Yeah. What I'm wondering and what [135] I'm — is we have a process that Mr. Molchan referred to as a weighing process, being that we're going to determine a person's responsibility for their actions or their culpability for their actions based on the peculiar abilities, lack of ability, whatever it may be of that particular person. Do you have a problem with that process, or do you think that, well, you did this act, it's got to be this punishment?

PROSEPCTIVE JUROR: No. I don't have a problem with that.

MR. DOSS: Okay. How about you, Mr. Williams?

PROSEPCTIVE JUROR: No problem.

MR. DOSS: Okay. Does anybody? Mr. Moye?

Mr. Smith —

PROSPECTIVE JUROR: Are we talking about the accountability of the actual actions?

MR. DOSS: Yes.

PROSPECTIVE JUROR: Is this —

MR. DOSS: That's a good way of stating it. Accountability, culpability, responsibility for the actions that will be, you know, in this case, it will be explained to you, but that whole weighing process of how we decide what's appropriate or not as opposed to of one size fits all.

PROSEPCTIVE JUROR: Okay.

[136] MR. DOSS: Does that make sense?

PROSEPCTIVE JUROR: Does what the 10 year-old has done, has he done it prior? The 24 year-old, has he done it prior? Does that have anything to do with it?

MR. DOSS: Well, yes, absolutely, but you're leading into exactly what I'm talking about as far as we're looking at the peculiarity of that particular person as opposed to the one size fits all that you did this, you get that particular punishment. But that's — that's an excellent observation. You're Mr. McBride, right?

PROSEPCTIVE JUROR: Yes, sir.

MR. DOSS: You know, I got to — I got to get into a subject, which is, kind of, a hot-button subject, and I never really — I never really think of a good seg-way or a good way to get into a subject like this. But, obviously, as you sit there, you see Mr. Hurst is an African

American man; and unfortunately, as much as we like to think that we've progressed as a society, some people still would hold that against him. I throw that out there because it's — it's always, kind of, the elephant in the room, I think, that nobody really likes to deal with and nobody really likes to talk about it. I can tell you [137] I'm uncomfortable bringing it up, to be honest, but it's something that I have to bring up because we got to know whether there's some kind of feeling out there that may be a different case is a better case for you. Maybe there's something that's there. Because nobody — believe me, I understand, nobody wants to raise their hand and say, no, I have a problem with that, or I can't be fair in that. But it's one of those where I'm going to ask you some questions, and I hope that you really think about it so we can, maybe, get some of it out. Maybe not. Maybe everybody ends up feeling too uncomfortable to talk about it. I sure hope not.

You know, the first question I have is what kind of reaction do you hear if you hear somebody use some kind of racial slur or maybe say some kind of racial joke, whether it's about an African American or whether it's about somebody else? I know this is an uncomfortable subject, but I'm going to have to pick on a couple of people, maybe, and hopefully get this out in the open. How about you, Ms. Lopez?

PROSEPCTIVE JUROR: I don't really like it.

MR. DOSS: Does it make you feel uncomfortable?

PROSEPCTIVE JUROR: Yeah.

[138] MR. DOSS: How about you, Ms. Shipman? I keep picking on you. You're, like, right in my line of sight. I'm sorry.

PROSEPCTIVE JUROR: I don't think it's appropriate to make jokes based on a person's color. No, not at all.

MR. DOSS: Okay. How about you, Ms. Preston?

PROSEPCTIVE JUROR: I don't think it is appropriate either.

MR. DOSS: I guess — I guess my question goes, like, even one step further than that. Like, how does it really make you feel? I think that the vast majority of people would agree that it's inappropriate. I fully expected those answers. But some people get angry. Some people get ashamed. Some people get really uncomfortable. Some people just want to leave. Other people are going to participate, then they're going to feel bad about participating. Some people are going to participate, they don't care. I got — I got a grandfather that uses language like that, that I detest. I love my grandfather to death, but he's 85 years old. He's been that way forever. He forever will probably be that way. But it makes it uncomfortable enough for me to say, don't talk about that around me, man. I don't like that. And I guess [139] that's more what I'm getting at with my question, and I know it's a very uncomfortable question for people to talk about. What do you think, Mr. Preble, right?

PROSEPCTIVE JUROR: Yes, sir.

MR. DOSS: I hope I'm pronouncing your name right.

PROSPECTIVE JUROR: That's correct. I remove myself from the situation.

MR. DOSS: Okay. How about you, Mr. Williams?

PROSEPCTIVE JUROR: I try to stay away from it, too.

MR. DOSS: How about you, Ms. Grantham?

PROSEPCTIVE JUROR: I wouldn't want to hang around and talk about something like that, so I try to stay away from stuff like that.

MR. DOSS: How about you, Mr. Hall?

PROSEPCTIVE JUROR: I usually put a stop to it.

MR. DOSS: Mr. Kranefuss, right?

PROSEPCTIVE JUROR: Right.

MR. DOSS: I just want to make sure I wasn't butchering your name.

PROSEPCTIVE JUROR: It's still wrong, but it's close enough.

MR. DOSS: It's enough for you to tolerate?

[140] PROSEPCTIVE JUROR: That's what everybody else calls me. No, I just avoid it, if I can.

MR. DOSS: Okay. How about you, Mr. Beverly?

PROSEPCTIVE JUROR: Pretty much the same way. I just try to avoid the situation. I don't like that kind of stuff.

MR. DOSS: Okay. How about you, Mr. Anderson?

PROSEPCTIVE JUROR: I mean, it comes up. People going to be people. Tolerate with them and try to avoid them. Not try to make no big issue about it.

MR. DOSS: How about you, Mr. Smith?

PROSEPCTIVE JUROR: I believe God judges, I don't.

MR. DOSS: Okay. Mr. O'Steen?

PROSEPCTIVE JUROR: Don't pay attention to it. Stupid.

MR. DOSS: All right. How about you, Ms. Robinson?

PROSEPCTIVE JUROR: I avoid it.

MR. DOSS: Ms. Smith?

PROSEPCTIVE JUROR: Everybody has their own opinions. I avoid it if I can. If not, you know, I just walk away from it.

MR. DOSS: Ms. Evans, right? How about you?

PROSEPCTIVE JUROR: I try, maybe, to talk to [141] the person to get them to see maybe what they're saying isn't appropriate.

MR. DOSS: All right. Ms. Preble.

PROSEPCTIVE JUROR: It upsets me to the point that in work situations I just try to ignore it and walk away from it because that's not the place to get into a confrontation, but you know, with friends and stuff, if they say something, I usually have something to say back.

MR. DOSS: Okay. Okay. So you — in a personal situation, you would bring it to their attention, and in a work situation, you don't want to have a confrontation; is that right?

PROSEPCTIVE JUROR: Right.

MR. DOSS: Okay. Okay. Mr. Faxlanger, right?

PROSEPCTIVE JUROR: First one today.

MR. DOSS: All right.

PROSEPCTIVE JUROR: It makes me uncomfortable, but pretty much avoid it. It's not the kind of people I surround myself with.

MR. DOSS: Okay. Okay. Mr. Akbari?

PROSEPCTIVE JUROR: I feel the same way. Makes me really uncomfortable.

MR. DOSS: Well, everybody in the back row can be very happy because I'm going to stop with [142] Mr. Akbari. So everybody that didn't want that question, you're off the hook.

Another question, and I don't remember it being asked but it's something that generally we need to know, is has anybody been the victim of a crime, of a violent crime or had somebody that you — that you love and care about or know really well be the victim of a violent crime?

Ms. Phelps, right?

And Ms. Henderson? I'm not doing a very good job about doing these numbers. I'm sorry. Ms. Phelps is 25 and Ms. Henderson is 26. Ms. Sykes, right? Mr. Rourke. I'm sorry, I skipped you. I didn't even notice. That's Ms. Cranford, right?

PROSEPCTIVE JUROR: Cranford, yes.

MR. DOSS: Did I get everybody on the third row. Okay. And Mr. Brackens, right? Anybody else on the fourth row? Mr. Felty?

PROSEPCTIVE JUROR: 49.

MR. DOSS: Anybody else that I missed? Okay. Not asking to — I don't want you to have to recount the details. Kind of goes back to what Mr. Molchan was talking about earlier, as far as can — and we say — we

say this and when we say it's almost like we don't want you to think that we're saying it lightly, as far [143] can you put it aside. I think that's the easy thing to say, is, yeah, I can put it aside, but I think the question goes further than that. Is knowing what you know about yourself and knowing what you think about it, would you want you on a jury that was deciding a life or death in regards to a first-degree murder case? So each person that — Ms. Phelps, Henderson, Sykes, Rourke, Cranford, Brackens, and Felty, when I say and I ask you can you put that aside, keep that in mind, do you think that would have an impact on you in making your decision as to whether to come back and say life and death in regards to Mr. Hurst? Do you think you can put that aside?

PROSEPCTIVE JUROR: No.

MR. DOSS: No for Mr. Rourke. Thank you, Mr. Rourke.

PROSEPCTIVE JUROR: No. 49.

MR. DOSS: No for Mr. Felty. Anybody that I missed? Ms. Cranford —

THE COURT: Mr. Doss, if you can refer to them by number, too, I would appreciate it. That helps me.

MR. DOSS: Mr. Felty, 49, and Mr. Rourke is 36. And, Ms. Cranford, you were just doing your hair, right? You did like this with your hair. I didn't know if it's one of those, like, I don't know or maybe [144] I do know. Okay.

The other question I had that I'm not sure that I know the answer to — no, I do got the answer to that. I'm sorry. Has anybody ever taken any courses in law, criminal justice, criminology, any kind of areas such as that, law related area? Mr. Faircloth.

Mr. Smith. Mr. Smith, you're Number 1, right?

PROSEPCTIVE JUROR: Yes, sir.

MR. DOSS: Mr. Faircloth, you're Number 60, correct?

Let me ask it this way because I see a bunch of you. Obviously, you're going to be asked to decide a bunch of — many matters of law. The Judge will read the instructions to you, much like what the Judge started the case where she started talking and telling you what was going to happen, the things that we were going to do. At the end of the case, I know several of you have been jurors before, some haven't, but the Judge, again, will read you instructions about what the law is and what the law says that you're supposed to do. Here's the question that I have for those of you that maybe you studied some law, you studied some criminology, or even those of you that like to watch crime shows: Is there anybody that thinks they're going to rely on their own knowledge over what the **[145]** Judge reads at the end of the case or try to interject their own knowledge as to what the law is as opposed to what's read on the bench by Judge Nobles? Does anybody at all think that?

Okay. That's an easy one, then.

Is anybody involved in any kind of organization that either advocates for the death penalty or against the death penalty?

You guys are making it real easy or else you just want to go.

PROSPECTIVE JUROR: Say that again.

MR. DOSS: You're Mr. Smith, Number 52, right?

PROSEPCTIVE JUROR: Right.

MR. DOSS: My question was, did anybody — was anybody a member or involved in a group that either advocated for the death penalty or against the death penalty one way or another? That was the question. I mean, I can think of some like Amnesty International or ACOU or, you know, I could.

PROSEPCTIVE JUROR: I think my religious preference is against the death penalty.

MR. DOSS: Okay. And I know we touched on that with a lot of people on the — that you got moral grounds one way or the other.

Can we approach?

[146] THE COURT: Sure.

(At the bench:

MR. DOSS: Judge, I'm through. I just didn't know — I wasn't going to get into the death qualification issues. I mean, if we're hosing them afterwards like we had talked about, I'll get into it then. I wasn't going to deal with it in the general group. I wanted to make sure before I told you that I was done.

THE COURT: Okay. I'm not really sure. What are you meaning? Are you asking me to excuse them again and bring them in one at a time for other issues? I don't understand what you're trying to do.

MR. DOSS: I thought that's we're — I thought that's what we were going to do, the ones that said they had moral — that they couldn't put it aside one way or another as far as automatically voting for death or automatically voting for life. There's, maybe — I wrote them down.

MR. MOLCHAN: There's a dozen.

MR. DOSS: Maybe that.

MR. MOLCHAN: I don't think there's that many.

MR. DOSS: And I thought that, that was the plan. But I wanted to make sure because I'd like to touch on some of these issues.

[147] THE COURT: And maybe I was confused. I don't mind doing it however you folks want to do it. But as opposed to conflict where it's a domino knocking down the others, is this something that needs to be done in private?

MR. DOSS: I think so, Judge. Because I've done it both ways. I think sometimes you poison the entire panel if you get somebody that's just out there, one way or another.

MR. MOLCHAN: I tend to agree. There could be an answer that just causes us more problems.

MR. DOSS: We don't want to waste all that good work.

THE COURT: Let them all out again, tell them we're going to call them in individually, ones we need to see, and then you're going to tell me the ones and I'm going to have them line up again?

MR. DOSS: We can do it that way, Judge, or I think we're going to bring all the people that have moral grounds at the same time. Because my guess is they're all so strong, we're not going to —

MR. MOLCHAN: I tend to agree with Mr. Doss. We can just leave the ones that we want in here.

MR. DOSS: Semi-individual, like a small group.

[148] MR. MOLCHAN: Let me get my seating chart.

(Bench conference concluded)

THE COURT: All right. Folks, I know this might seem like a little unorthodox procedure, but this is just the way we do these types of trials. And there's no sense for everybody to sit in here and have to be on those hard benches when we have some specific questions to ask some specific individuals.

So what I'm going to do is I'm going to have all of you step out again. I'll have court security come get the folks. And I'll think we'll bring them all in this time instead of one at a time. We'll bring in a small group at a time, and then we'll ask you questions. So, again, if you could take a look to your left and right, step out, we'll call you back in just as quickly as we can.

(Panel out)

THE COURT: Let's go row for row. On the first row.

MR. DOSS: I don't think I have anybody on the first row. The first one I have is Juror Number 14, Booker.

MR. MOLCHAN: Ms. Booker, I agree.

THE COURT: So you don't want to get into the — and, again, don't trust my notes — but you don't [149] want to get into anyone that said just for morals that they can't, that you're leaving those alone?

MR. DOSS: Well, the ones I have are the ones that said for — Mr. Molchan asked whether they were against capital punishment.

THE COURT: He asked two distinct lines of questions. One was for moral and religious reasons can you stand in judgment. Are you leaving those alone?

MR. DOSS: I don't have those. I had —

THE COURT: If you're leaving those alone because it's a different issue, that's fine. If all you're trying to do is rehabilitate on the death penalty, that does take them down.

MR. DOSS: That's what I was focusing on. I had three as being for — three as being for, not the number four, F-O-R, for. One, two, three, four, five, six, seven.

THE COURT: Let me see if I have them again. The first one, then, death penalty that said was Number 14.

MR. DOSS: Right.

THE COURT: Let's see. Then —

MR. DOSS: 24.

MR. MOLCHAN: I got 24, Mr. O'Steen.

THE COURT: Yes, sorry about that. That would [150] be 24. The next would be — and you guys probably looked at yours better than I have.

MR. DOSS: Sykes is the next one I have. Number 30.

MR. MOLCHAN: Yes, I agree.

MR. DOSS: Then I got Rourke.

THE COURT: Rourke. That's 36.

MR. MOLCHAN: Uh-huh. I don't think —

THE COURT: Then I have 37.

MR. MOLCHAN: 36, I thought he would, Mr. Rourke —

THE COURT: I thought he said — well, go ahead.

MR. DOSS: He's the one that also said that he couldn't put it aside regarding —

MR. MOLCHAN: To me, I think he's a cause strike. I mean, I don't think there's any reason to bring him back.

THE COURT: So we're not going to bring in Number 36?

MR. MOLCHAN: I don't see any reason to bring him back.

THE CLERK: I show that you already struck him for cause.

MR. DOSS: He's already out for cause.

[151] THE COURT: He could be the conflict for cause. So 36 — so right now we have 14, 24, and 30. Then I have 37, Mr. Cangelosi.

MR. MOLCHAN: He's already gone.

THE COURT: And he is gone because he was a work because. Then I have Brackens, but he was already gone as a work cause.

MR. DOSS: Moye.

MR. MOLCHAN: Moye is already gone for cause.

MR. DOSS: Okay. Mauldin is gone, too, already for cause.

THE COURT: No. I don't have Maudlin for cause.

MR. MOLCHAN: He basically said that he could — I think he's a cause already.

THE COURT: Because he did say he wouldn't listen to the presumption. So you want to strike him?

MR. DOSS: That's fine with me, Judge.

THE CLERK: That's 47?

THE COURT: Yes. Mr. Mauldin.

MR. DOSS: 48, Mezick.

THE COURT: You want to bring her in? She was the lady that was, kind of, rehabilitated with the health issue. She's the one with the asthma. You want to bring her in?

[152] MR. MOLCHAN: We'd have to bring her on about the death penalty.

THE COURT: That's fine. We'll bring her in. So we have 14, 24, 30, and 48.

MR. DOSS: Mr. Herry Smith, Number 52. I had him, too, Judge.

MR. MOLCHAN: I had him, too.

MR. DOSS: That's all I have.

MR. MOLCHAN: That's basically what I have.

THE COURT: Mr. Smith, yes, 52. That's all I have.

All right. And you want to bring them in as a small group instead of just individually?

MR. DOSS: Yes, Judge. And are — I didn't know if you — I know you have some in your book. I didn't know if you were going to do it, if Mr. Molchan was going to start on it, or how we're going to do it.

THE COURT: I had not intended on doing it. At this point in time, I was going to leave it to you folks.

MR. DOSS: Okay. Well, if — just a suggestion. If you want to go back to Mr. Molchan starting it, if I think I need to ask anything, then I can.

MR. MOLCHAN: I can ask just a few questions [153] and it may —

MR. DOSS: Sometimes it crystallizes real fast and other times it's wish-wash.

THE COURT: And is what you're going to get into the weighing and how it works?

MR. DOSS: I think we'll get into the weighing or whether —

MR. MOLCHAN: Capable of weighing —

MR. DOSS: Or just one way or the other —

MR. MOLCHAN: That their opinion has reached a point that it's — that they won't consider the evidence or the instructions.

MR. DOSS: It's the whole witherspoon whip.

MR. MOLCHAN: Or we have a reasonable doubt that they will take a look at that.

THE COURT: All right. So you feel —

MR. MOLCHAN: I can do it.

THE COURT: I have a whole — I have about five pages here on death penalty qualifying, but if you think you can cover that ground —

MR. MOLCHAN: I think I can short-circuit it. Think I can do it.

THE COURT: Mr. Doss, if you believe that he has missed anything, please let me.

Okay. All right, folks. I'm going to need to [154] see Juror Number 14, which is Lelia Booker.

Hey, folks. On Lelia Booker, my notes say that she was the one that pointed that said she knew — and I couldn't tell.

MR. DOSS: She knew the stepfather.

MR. MOLCHAN: And said she couldn't be fair and impartial.

THE COURT: And then she said she couldn't be because she knows the case. So is there any reason to bring in Ms. Booker? Okay. That's —

MR. DOSS: Unfortunately not.

MR. MOLCHAN: I don't think there is.

THE COURT: Then nevermind. I'm going to need Juror Number 24, which is Larry O'Steen, Juror Number 30 — now, Lucinda Sykes, didn't she say she knew the case and she couldn't be fair, too?

MR. DOSS: I just put down that she knew the case.

MR. MOLCHAN: I've got PTP, pretrial publicity, but I also have that she couldn't sit in judgment. And she was anti-death penalty and couldn't do it. I've got her on both.

THE COURT: Well, I tell you, when it comes to Ms. Sykes, you may want to ask that because I just had my notes, and again, I'm looking through the back of [155] y'all's head and sometimes I get my jurors confused.

MR. MOLCHAN: I got her down as pretrial publicity, that she did know something about it.

THE COURT: I have, knows case, can't, which indicates to me that I heard her say that she couldn't sit fairly. So you may want to ask her that.

So 24, which is Mr. O'Steen; 30, which is Ms. Sykes; 48, which is Ms. Mezick; and 52, which is Mr. Smith, if I could see those four.

SECURITY OFFICER: Are you wanting them to sit down or —

THE COURT: Bring them into the front row.

(Prospective jurors present)

MR. MOLCHAN: Those jurors are present, Judge.

THE COURT: They certainly are. All right, folks. I am going to let Mr. Molchan ask a few more questions of you, and then if Mr. Doss chooses to follow-up, I'm going to give him an opportunity to do so as well. And let me just say that I have Mr. Smith,

I have Mr. O'Steen, Ms. Mezick, and Ms. Sykes?

PROSEPCTIVE JUROR: Yes.

THE COURT: Mr. Molchan, proceed.

MR. MOLCHAN: We're not picking on you or anything. We're just trying to make sure that we're all on the same page and make sure we understand your [156] questions.

Mr. O'Steen, you had indicated — I'd asked an opinion about the death penalty. And I believe you indicated that you were against the death penalty?

PROSEPCTIVE JUROR: Very much.

MR. MOLCHAN: And I believe the rest of y'all had taken a similar type of opinion or voiced a similar type of opinion. My question is this: The Court will provide — and I'm not — you know, your opinion is your opinion, and you have every right to your opinion. There's nothing wrong with that. There's absolutely

nothing wrong, and I don't want to ever be considered as attacking your opinion. But the question is this: The Judge and the State of Florida in this process will — we would go through a process where we would provide with — provide to you evidence of aggravation, mitigation, and there would be a judging process, an analysis process that would be guided by the instructions from the Court. All of you will respect your opinion about the death penalty. The question is, like I asked the other folks, can you leave that opinion outside and render a fair and impartial decision utilizing what the Court says, that you — if there's evidence that you would have to, you know — if it was, say, a hundred percent aggravation and no [157] mitigation, impose or make a recommendation or a vote of that? Do you feel that you — do any of you feel that you could engage in that type of process and put aside your own opinion in this situation?

If you were selected as a juror, would you be able to do that, Mr. O'Steen?

PROSEPCTIVE JUROR: I can tell you right now, I cannot look at that man and tell you that I'm going to put a recommendation ending his life. I can't do it.

MR. MOLCHAN: Thank you, sir.

Ms. Mezick?

PROSEPCTIVE JUROR: I can't do it either, no. I can't take another — I can't take another — or be responsible to take another man's life or anybody's life.

MR. MOLCHAN: Mr. Smith, you had indicated that you had a religious type of — again, could you engage in that process?

PROSEPCTIVE JUROR: (Nodded head)

MR. DOSS: No, sir? That'd be no?

PROSEPCTIVE JUROR: (Nodded head)

MR. MOLCHAN: And then, Ms. Sykes, same question of you. And I think you also had indicated you had some knowledge, pretrial publicity, you had [158] known about the case in some respects?

PROSEPCTIVE JUROR: (Nodded head)

MR. MOLCHAN: Did you also didn't think it was appropriate for you to sit because of that information you had?

PROSEPCTIVE JUROR: Well —

MR. MOLCHAN: I don't want you to go into the specifics, but was that also part of your rationale? Or did you say that —

PROSEPCTIVE JUROR: Yeah, yeah.

MR. MOLCHAN: I thought you mentioned that. I just wanted to be sure. Again, respecting your opinion, could you feel you could engage in that process, if called as a juror, or do you think your personal opinion would come into the jury room?

PROSEPCTIVE JUROR: I just would have — I don't know because I don't know whether I could do that.

MR. MOLCHAN: When you say do that, you mean make a vote for a death?

PROSEPCTIVE JUROR: (Nodded head)

MR. MOLCHAN: I don't have any other questions, Judge.

THE COURT: Mr. Doss?

MR. DOSS: Just a couple, Judge.

[159] Ms. Sykes, I hear what you're saying when you're saying I'm not sure. I think the question — and not sure is fine. Don't get me wrong. Not sure is fine. I think the question is, is I'm sure you've had situations in your life where you've had to set aside some personal feelings and make a decision based on facts, right?

PROSEPCTIVE JUROR: Right.

MR. DOSS: And based on, kind of, like, your own rules in your head of how you're going to weigh out a decision, right?

PROSEPCTIVE JUROR: Right.

MR. DOSS: And so I think the question is, knowing that the Judge is going to give you some rules of how to weigh out the decision, you're going to sit and hear the facts, not presuming which way you're going to go, would you be able to sit there and say, maybe I will, maybe I won't? Or would it be one where you just walk into the situation and you say, I'm voting that way no matter what. I don't — it's not that I don't care what Judge Nobles says, it's just that I feel so strongly that way that I just can't?

PROSEPCTIVE JUROR: No. I probably — if given facts and guidelines, yes, I probably could do it. Would I want to? I don't think I want to. But I [160] could.

MR. DOSS: Nobody wants to, I don't think. But you think you could?

PROSEPCTIVE JUROR: I could with given guidelines. I could do that, yes, but I mean, you know.

MR. DOSS: Now the next step for you is knowing — not going into the details of what you knew about the case but knowing what you said you got information

about the case, whether it's, you know, the pretrial publicity, knowing that and knowing the way I asked you the question — knowing that you know that but the Judge will read you instructions saying you got to depend on — I'm paraphrasing — but you've got to make up your mind on what comes from that witness stand as opposed to anything that you heard maybe out there or you read, is that something that you could say, well, you know what, even though I heard that, that's not going to come into play when I go through these guidelines and I try to make up my mind one way or another what to do? Do you think you could — knowing that, do you think you could set that aside, if you were chosen? Who knows whether you're going to be chosen?

PROSEPCTIVE JUROR: That wouldn't be a problem [161] for me. I just wanted to be honest and say that I had heard of it.

MR. DOSS: And we surely appreciate that. That's why all four of you are here, because you were so honest and candid with it. And so we're trying to sort through those issues a little bit, you know.

Ms. Mezick, knowing the way I phrased it as far as with Ms. Sykes, I'm sure you've made some decisions in your life where you, kind of, had to set aside your personal feelings and go through them and weigh the facts and go through a process of this is the way I'm going to consider this decision, if Judge Nobles is going to give you the process of considering the decision, which we call the weighing process, and is going to give you the guidelines, if you were chosen, you would sit here and you would hear all the facts and you would hear Mr. Molchan's argument, you would hear my argument, and then we would send you back there to make a decision,

do you think it's one of those where you make a decision, or do you think it's one where you'd vote one certain way no matter what, no matter what was presented, one way or another?

PROSEPCTIVE JUROR: I would understand the Judge telling me I have to do it this way and look at all the evidence and everything and weigh out things [162] and all. However, I just can't feel right putting a man to death even though he took someone else's life. And I know the Bible says an eye for an eye, but I just — I couldn't do that. I'm sorry. I just couldn't do that.

MR. DOSS: How about you, Mr. O'Steen?

PROSEPCTIVE JUROR: I mean, I understand how the instruction — how everything is supposed — mechanics of it. When it came down to it, I couldn't do it. There's no way.

THE COURT: So regardless of the mechanics, and not meaning any disrespect to the Court or anybody else, you just can't do?

PROSEPCTIVE JUROR: I can't do it, yeah. Can't do it.

THE COURT: How about you, Mr. Smith? Do you feel, kind of, like Ms. Sykes does or more like Ms. Mezick or Mr. O'Steen as far as if the Judge is going to lay out the whole process for you, as far as how to consider things and knowing that you would be here for all the facts that come through the witness stand, the argument that comes from the attorneys, do you think — and the instructions from the Judge, do you think it's one of those things where you could honestly weigh it back and forth or that you'd say, you [163] know what, no matter what you tell me, I've got to vote this one certain way?

PROSEPCTIVE JUROR: Well, from the nature point of view of it, I could, but I'm trying to go from the nature to the super natural. And the way I'm, kind of, in the super natural, I just don't believe in the death penalty. I'd rather see a person locked up the rest of his life they done did something terrible, but you know, to vote to just put him in the chair or something, no, I'm not going to do that.

MR. DOSS: I don't have any other questions, Judge. Thank you.

THE COURT: All right. You folks — counsel, can we bring the rest of the panel now, or you folks want me to let these folks step out?

MR. MOLCHAN: I'm ready for the rest. Are you?

MR. DOSS: I think we can bring them all in, Judge, and we'll start. I think so.

THE COURT: If y'all will bring everybody else back in, and folks, if you will resume —

MR. MOLCHAN: Just let him have time to talk to his client, Judge.

THE COURT: Sure. I tell you what. Let's just have these folks step out for a minute, and we'll [164] bring everybody in, in just a second.

(Prospective jurors out)

MR. DOSS: Judge, are we still on the record?

THE COURT: We are on the record. Just speak.

MR. DOSS: Mr. Molchan and I were conferencing here. We concur that everybody but Ms. Sykes in that group is a cause and that she's not.

MR. MOLCHAN: No problem with that, Judge.

THE COURT: All right. So do you have more questions that you were going to be asking, Mr. Doss?

MR. DOSS: No, Judge. I'm done.

THE COURT: All right. So we are going to start into the selection part in just a moment?

MR. DOSS: Yes, Judge.

THE COURT: Would you like Mr. Hurst to be up here in the witness box so he can hear what's going on and you can refer to him up here instead of at the table?

MR. DOSS: That would probably be more convenient, Judge. I'll talk with him for a second here, and we'll move up there, if that's okay.

THE COURT: That's fine.

(Pause in proceedings)

THE COURT: All right. Mr. Doss, have you had an opportunity to confer with Mr. Hurst?

[165] MR. DOSS: I sure have, Judge.

THE COURT: All right. Do you have any other questions that you want to ask these folks?

MR. DOSS: No, Judge. I'm through, as far as my voir dire questions.

THE COURT: And I will tell you folks, as we compare notes as we go along, if you folks want to bring somebody up, not a problem. We'll do so.

MR. DOSS: Okay. I do have a question as to, just because so many judges do it a little bit different way. I'm assuming that we're going to do the first 12 as the presumptive 12. I don't know how Your Honor does it as far as do you ask the State if they have a strike and then me and can you back-strike?

THE COURT: And I usually explain this to the Defendants, and it may cover what you're asking.

All right. Mr. Hurst, we are up here today to impanel your jury, and you will be able to confer with Mr. Doss any time that you would like.

If you look on the list, the first 12 are going to be your potential jurors. For anybody that said they couldn't be fair, unlimited strikes that we call them for cause, and all those folks are going to be gone. Then each side has ten strikes for what we call preemptory. Preemptory are — and it's a little [166] more complicated than this, and both Mr. Doss and Mr. Molchan know the parameters, but it's basically for some reason you get a bad feeling about somebody or something that they said doesn't sit right with you, each side gets ten of those.

What I'm going to do is I'm going to start with the State because they have the burden, and I'm going to ask him to tell me of the fist 12 if there are any cause. Then I'm going to ask Mr. Doss if they have any cause. Then we'll add to the 12. When we get down if there's no more cause, then I'm going to start preemptory with Mr. Molchan. Then I'll go back and forth like a tennis game. Of course, you can always back-strike up until the jury is selected. Now, let me tell you what I don't do: Once we get a jury impaneled and we go to the alternate, if you choose to back-strike out of the panel, the alternate doesn't go in the panel. We'll just go back to the empty folks. Does that make sense?

MR. DOSS: Okay. I always figured once that was picked, that was picked, Judge. I've never went back and struck out of that.

THE COURT: I've actually had people come back and say, you know what, even though we've got the panel, I want to go back. I've got an extra strike. I [167] want to strike Number 2. And that's fine. But Number 24 who's alternate won't become the panel. That person will remain the alternate. We'll go back to the rest of the empty folks to replace the person on the panel.

So once we designate somebody an alternate, they're an alternate, okay. Unless, of course, someone becomes ill and then they become on the panel.

MR. DOSS: I've got to grab my pad, Judge.

THE COURT: That's fine.

All right. If you folks will bring in the panel again. And I will address them once we get everybody seated.

Mr. Molchan, if you can come in here while they're filing in here. And, also, for Mr. Molchan and Mr. Doss, if either of you have any challenges to each other's strikes, please feel free to raise them, and we'll have the hearing.

(Prospective juror at the bench)

THE COURT: I believe the panel is back in the gallery. Folks — Mr. Doss, do you have any further questions? I think we were with you when we came up to the bench.

MR. DOSS: No other questions, Judge.

THE COURT: All right. I thank you folks for your patience. We are now going to start the actual [168] selection process. So I will tell you during that time, if you want to stand up and stretch your legs, that's fine. If you want to talk amongst yourselves, please, that's fine, but just do it very quietly. Security, if you hear

them getting loud, please remind them to speak lower. Because we have to hear what we're doing up here. I will tell you that we will be turning around and looking at you, pointing at you, talking about you. Don't be paranoid. What we're trying to do is put names with faces with answers. We may still call a couple of you up, if that's necessary. But with that, we're going to begin.

(At the bench:

THE COURT: All right. Mr. — any for cause?

MR. MOLCHAN: Juror Number 1, Mr. Samuel Smith had indicated he could not judge. In fact, made the comment, God judges, I don't. I think there's a judgment issue with that.

THE COURT: Do you agree?

MR. DOSS: Did he say he couldn't put it aside?

MR. MOLCHAN: I've got written down, not judge, not sure — he said he was not sure. He was —

MR. DOSS: I thought he equivocated.

THE COURT: Well, I have — well, we might [169] start off with Number 1. I have on my notes, moral issues, can't, but I will be more than happy to bring him up if your notes don't match mine.

MR. DOSS: I thought he was not sure, Judge.

THE COURT: Let's bring him up. We are starting right now with Mr. Smith. Come on down.

(Prospective juror at the bench)

THE COURT: Mr. Smith, when you have three people taking notes, sometimes our notes don't jive. So we just need to clarify. In the very beginning today

when Mr. Molchan asked a question about whether somebody had any moral beliefs or religious beliefs or anything of that as it related to this case that might make it difficult for them to sit, your answer was?

PROSEPCTIVE JUROR: Just in general. When I woke up this morning, I didn't know I was going to be deciding on a man's life or send him to jail for the rest of his life.

THE COURT: I fully understand that.

PROSEPCTIVE JUROR: That is a heavy, heavy burden for anybody.

THE COURT: It is.

PROSPECTIVE JUROR: And I really just, in general, don't want to.

[170] THE COURT: Okay.

PROSEPCTIVE JUROR: That's my —

THE COURT: It's — and these guys have said it all afternoon, too, there's no right or wrong answer. I fully understood when you first walked in here that this was going to all of a sudden be a very eye-opening experience because you guys might have expected a trespass case and now you have this. But the issue is whether it's your personal beliefs, general or specific, religion, moral, whatever title you want to put on it, are you able to sit in this case with some of the facts and then —

PROSEPCTIVE JUROR: Without bias?

THE COURT: Without bias apply the law and reach a decision that you believe the evidence justifies? And there is no right or wrong answer. It's just whatever your answer is, it's okay.

PROSEPCTIVE JUROR: No, I don't have that ability, ma'am.

THE COURT: Okay. Mr. Molchan, again?

MR. MOLCHAN: No other questions.

THE COURT: Mr. Doss?

MR. DOSS: No.

THE COURT: Thank you, sir. That's fine.

(Prospective juror excused)

[171] THE COURT: He'll be struck for cause.

MR. MOLCHAN: So what I have is 2, 4, 7, 8.

THE COURT: And — okay. I'm sorry. I have 2, 4, 7, 8.

MR. MOLCHAN: I've got through Juror 18 as our presumptive 12, with exclusions of 14, 9, 6, 5, 3, and 1.

THE COURT: And I'm sorry. I wasn't listening to you because I was writing.

MR. MOLCHAN: Through 18.

THE COURT: Let me do this: Right now we have Juror Number 2, David Anderson. We have Juror Number 4, Terry Kranefuss; we have Juror Number 7, Melissa Grantham; Juror Number 8, Kenneth Williams; Juror Number 10, Sean Preble; Juror Number 11, Erica Swanson; Juror Number 12, Gail Preston; Juror Number 13, Jennifer Feliciano; Juror Number 15, Jonathan Guthrie; Juror Number 16, Donna Hoag, H-O-A-G; Juror Number 17, Purtia Tayabas — that's T-A-Y-A-B-A-S — and Number 18, Abdollah, A-B-D-O-L-L-A-H, Akbari, A-K-B-A-R-I. So, yes, that would be through 18. Any for cause?

MR. MOLCHAN: None for cause, but I would...

THE COURT: Do you have any for cause?

MR. DOSS: No, ma'am.

THE COURT: Folks, again, I'm going to throw [172] out what I heard. You folks can tell me if you want to disregard my notes or you want to bring them up. But I have both Juror Numbers 16 and 17 on the moral issue.

MR. MOLCHAN: That's what I have, too. They're circled.

MR. DOSS: On what issue?

MR. MOLCHAN: On the moral issue.

THE COURT: I've got both of them saying that they cannot.

MR. MOLCHAN: That's what I have.

THE COURT: And I certainly would not —

MR. MOLCHAN: I got circled judgment on there.

THE COURT: How about I bring up 16 and 17?

MR. DOSS: I think so, Judge.

THE COURT: Ms. Hoag, Donna Hoag, if you could come up, please.

(Prospective juror at the bench)

THE COURT: Hi, ma'am. When you get three people taking notes, sometimes they don't jell. So we bring the people up and we just want to make sure.

Way earlier in the day, Mr. Molchan asked a question whether someone for moral, religious, or any other just general feeling felt that they could not sit on this case because it would be against their beliefs. What was your answer?

[173] PROSPECTIVE JUROR: I said, yes, because my religion is Catholic, and we pretty much, you know, don't believe in the death penalty, you know.

THE COURT: So you indicated —

PROSEPCTIVE JUROR: I can't say, you know, I don't know how I feel after hearing this. That was why he asked why it was religious or morally. That's why I raised my hand.

THE COURT: That's fine. Let me tell you, there are absolutely no right or wrong answers. Everybody's answers are their own, and I'm not going to pass judgment on anyone. We're just trying to find out. So is — because I understand you said you're Catholic, does that mean that you cannot sit on this case because of the nature of the case?

PROSEPCTIVE JUROR: No. I'm just going to say that I don't know if I would be pre-dispositioned to go, you know — like, him saying give me life instead of death. I can honestly say I don't know after hearing it how I'd like feel either way. I mean, as of right now, I am going to find — I would want life for somebody because I know that, that would be —

THE COURT: Well, what I'm going to do now is I'm going to turn it over to counsel.

PROSEPCTIVE JUROR: Either way, I don't [174] believe —

THE COURT: That's okay.

MR. MOLCHAN: Let me ask this question: In essence, you have gone through the process where we have — there's potential for aggravating circumstances, mitigating circumstances, and the Court would provide you instructions on how to evaluate and weigh

those different factors and that you could be at a certain juncture faced with voting for a death recommendation or a life recommendation. Now, irrespective of — do you feel that your religious beliefs would interfere or could interfere with that?

PROSEPCTIVE JUROR: I can't honestly say — I mean, I won't say based on my, you know, religion —

MR. MOLCHAN: I guess my question is: Whether your opinion, regardless of what it's based upon, do you think you can push that aside and leave it on the courthouse steps? And only you can tell us that. We're, kind of, putting that on you.

PROSEPCTIVE JUROR: With my rights, I would want to say yes, I would —

MR. MOLCHAN: Well, everybody wants to be a good juror, but that's not the question here. We're not looking for — that's not the issue. We're looking for a person who can —

[175] PROSEPCTIVE JUROR: I can't honestly say I would not have my religion or feel in my, you know — and I can't, you know — I might not at the end or I may —

MR. MOLCHAN: It's a hard question to ask.

PROSEPCTIVE JUROR: It's hard for me to answer. I mean, I want to say listen to the case and be fair, but then I can't honestly say that — it's not in the back of my mind.

THE COURT: Mr. Doss?

MR. DOSS: That's the question. We're not — number one, nobody questions your sincerity at all. I think the question is, knowing that the Judge is going to give you the process and you're going to hear all the

facts and then you're going to be asked to make a decision, I think the question is would, regardless of that, would your morals tell you, I've got to go this way regardless of whatever I heard, regardless of whatever the Judge says; not meaning any disrespect to the Judge, just morally I can't do that. I think that's the question. Not necessarily which way you would go. That's definitely not the question.

PROSEPCTIVE JUROR: Okay. So when I don't feel my religion to limit that now — I mean, I guess what you're saying is — what you're saying on the [176] front porch on this stuff — I can't say. I know it's a terrible answer.

THE COURT: It's okay. That's all right. That's okay. You can take a seat.

(Prospective juror excused)

MR. MOLCHAN: I would move for a strike cause. I think her answers indicate that there's a reasonable doubt as to whether she can exercise her —

MR. DOSS: She's an equivocator, again.

THE COURT: I actually wrote down equivocator.

MR. DOSS: She's a very sincere, good woman. Very heart-felt answer.

THE COURT: That brings us to Number 19, which is James Faxlanger, but I'm going to call — I know I'm going to mess this up.

Ms. Tayabas.

(Prospective juror at the bench)

THE COURT: Hi, ma'am. When you have three people taking notes, sometimes they don't always agree, so we bring people up just to make sure. Way

earlier in the day Mr. Molchan asked a question that just basically said, if someone because of their religious or their moral or for whatever reason just did not believe that they could sit on this type of a trial, your answer was?

[177] PROSEPCTIVE JUROR: Well, I'm pro-life.

THE COURT: I'm sorry?

PROSPECTIVE JUROR: Pro-life.

THE COURT: Oh, okay. All right. All right. So — and I'm going to give both attorneys an opportunity to ask questions, too. Because sometimes when we ask, some people can ask it differently and also when the light goes on. But a lot of people come in here with their beliefs. And there is no right or wrong answer. Whatever answer it is, it's your. And nobody in here including me is going to pass judgment on you. We just need to know what the deal is. But if your back there and you're given the evidence and you've heard the arguments of the lawyers and you've given — heard the law from me, are you telling me that your belief would interfere with — may interfere with being able to apply all the other things?

PROSPECTIVE JUROR: I'm sorry. It wouldn't change my answer because my religion. I'm a devoted Catholic, and no matter what he did, I can't say that anything —

THE COURT: Okay. Anything, Mr. Molchan?

MR. MOLCHAN: No, ma'am.

THE COURT: Anything?

MR. DOSS: No, ma'am.

[178] THE COURT: Thank you very much.

(Prospective juror excused)

MR. MOLCHAN: Religious cause.

THE COURT: We're now up to 20. Anymore cause?

MR. MOLCHAN: No.

THE COURT: Anymore cause, Mr. Doss?

MR. DOSS: No.

THE COURT: All right. Now we start with preemptories.

MR. MOLCHAN: None from me. No.

THE COURT: All right. Mr. Doss, to you.

MR. DOSS: Number 12, Ms. Preston.

THE COURT: Which one?

MR. DOSS: Number 12.

THE COURT: I could barely hear Ms. Tayabas.

All right. So that brings us up to 21, Angela Evans. And from this point, as we're ping-ponging back and forth, if you folks would let me know if you believe that there's cause.

MR. DOSS: Okay.

MR. MOLCHAN: I'm fine with Ms. Evans, 21.

THE COURT: Mr. Doss — it's still with Mr. Doss as far as preemptories.

MR. MOLCHAN: Oh, okay.

[179] THE COURT: You struck Number 12.

MR. DOSS: That's correct. So it's still me?

THE COURT: It's you unless you want to yield.

MR. DOSS: I would strike Number 18, Mr. Akbari.

THE COURT: That brings us up to Number 22, Roxie Smith.

MR. MOLCHAN: I have judgment on her. If we can bring her up.

THE COURT: Ms. Smith, Roxie Smith, please.

(Prospective juror at the bench)

THE COURT: Hi, Ms. Smith. A lot of times when we're taking notes, we have three people, sometimes we don't always have the same notes, so I'll just go back and ask some questions. Way earlier in the day Mr. Molchan asked a question about whether someone's religious or moral beliefs prevented them from being able to sit on this jury and being a fair and impartial juror. What was your answer to that question?

PROSEPCTIVE JUROR: It's mainly moral. I guess I'm just, kind of, confused on the subject about what y'all were saying, just, like, my beliefs. But I don't think it's our place to put someone to death. But at the same time, we don't believe that he's going [180] to do the same thing. So, you know, I think, like, if I were to listen to, like, evidence and it was explained to me in full detail, I put a lot of thought into it, I think I'd be able to make a proper decision on it.

THE COURT: Okay. So if I hear you — because some folks walked in blind, and you also, when you hear that this is this big case and this was a big question from Mr. Molchan, but what I hear you say now is even though it's not something that you relish, that if you listened to the evidence and argument of the lawyers and the instructions from me, you believe that whatever personal beliefs you had you could put aside and you

could just go on the law, the evidence, and the arguments.

PROSEPCTIVE JUROR: Yes, ma'am. I believe in fairness.

THE COURT: Mr. Molchan?

MR. MOLCHAN: No questions, Judge.

THE COURT: Mr. Doss?

MR. DOSS: No questions.

THE COURT: Thank you, ma'am.

(Prospective juror excused)

MR. MOLCHAN: Me?

THE COURT: Yeah. Actually, that's not true. [181] Because — I'm sorry. Well, when he struck Number 18, it moved it to 22. You wanted her to come up because of the moral issue. So it's still with you, Mr. Doss, unless you want to yield.

MR. DOSS: I thought he went first last time.

THE COURT: I'm sorry?

MR. DOSS: I thought he went first last time.

THE COURT: No. Well, if you strike somebody, you still get to go. You get to go —

MR. DOSS: I thought we were going back and forth.

THE COURT: Once you have the floor, you got it until you yielded.

MR. DOSS: Oh, nice. My wife says that, too.

THE COURT: Of course, if you'd like to ping-pong, you can just yield after every strike. It's not a problem.

MR. DOSS: I'll strike Mr. Kranefuss, Number 4.

THE COURT: All right. That brings us up to Number 23. You need me to call her up?

MR. MOLCHAN: Yes, we do. Because I got judgment on mine.

THE COURT: All right. Ms. Robinson. There she comes. Thank you, ma'am.

[182] (Prospective juror at the bench)

THE COURT: We're all taking notes, and sometimes they don't match. So sometimes I have to bring people up here and ask. Earlier this morning Mr. Molchan asked a question, and it was basically if someone's religious or moral beliefs would make it so that they did not believe that they could listen to the law, listen to the argument, listen to the — see the evidence, and be able to apply the case, apply all of that to the case; in other words, they would let their personal position interfere with their judgment. And your answer was?

PROSPECTIVE JUROR: I can put it aside. I raised my hand, but I can put it aside.

THE COURT: You can? What I'm going to do is I'm going to let the attorneys ask questions in a minute, but I just want to make sure. Because, originally, you did raise your hand, but after you heard all the rest of the questions from the attorneys and you got a better handle on it, you believe that you can listen to everything and you can make a good decision, that you can leave your own personal feelings out there and listen to me and the attorneys and apply the law and the evidence?

PROSEPCTIVE JUROR: Yes.

[183] THE COURT: Mr. Molchan?

MR. MOLCHAN: We talked about, and I think I asked the question about judgment early on, we talked about aggravating and mitigating circumstances and how the Court was going to instruct you on how to weigh those. And you feel you're capable of doing that?

PROSEPCTIVE JUROR: Yes, sir.

MR. MOLCHAN: And coming up with a fair and impartial verdict or recommendation to the Court? No problem with that?

PROSEPCTIVE JUROR: I can.

MR. DOSS: I don't have any questions. Thank you.

THE COURT: Thank you very much.

(Prospective juror excused)

THE COURT: Mr. Doss, it is still with you.

MR. DOSS: Ms. Larry.

THE COURT: Which one?

MR. DOSS: Ms. Lara. She's Number 20.

THE COURT: Okay. The Defense has now used — let's see.

MR. DOSS: Four, right?

THE COURT: Four. Four of the ten strikes. That brings us passed Mr. O'Steen up to Ms. Phelps.

MR. MOLCHAN: Oh, I'm sorry. We're going the [184] other way.

MR. DOSS: I'll go ahead and yield.

THE COURT: I'm sorry?

MR. DOSS: I'll go ahead and yield.

MR. MOLCHAN: So that leaves us with 25.

THE COURT: Yes. Back to you, Mr. Molchan.

MR. DOSS: I'll strike Number 21, peremptorily.

THE COURT: That brings us to up Number 26, Rene Henderson.

MR. MOLCHAN: And I'll yield, since that seems to be the word of the day.

THE COURT: Back to you.

MR. DOSS: Ms. Phelps, Number 25, I'll strike her.

THE COURT: And you're striking Number 25. That will be Phelps.

MR. DOSS: I'll give the floor to Mr. Molchan.

MR. MOLCHAN: Is it to 28?

THE COURT: Yes. We cross over to 27. That brings us to 28, Kristie Lucas.

MR. MOLCHAN: I'm good with that.

MR. DOSS: I'll strike Number 26, Ms. Henderson.

THE COURT: That brings us up to Number 29, [185] Tony Stanfill.

MR. MOLCHAN: We're still with Mr. Doss.

MR. DOSS: I'll give it up.

MR. MOLCHAN: That's fine.

THE COURT: And I'm sorry because I was counting. Let me make sure.

MR. DOSS: We're up to Stanfill, Number 29. Correct?

MR. MOLCHAN: Yep.

THE COURT: And I'm sorry. So we are up to 29, Tony Stanfill. What did you say?

MR. DOSS: I'll yield to Mr. Molchan.

THE COURT: Okay. Mr. Molchan?

MR. MOLCHAN: That's fine.

THE COURT: So these folks are good for you?

MR. MOLCHAN: Uh-huh.

THE COURT: Do you want to run them by your client and make sure?

MR. DOSS: Uh-huh.

That's fine with us, Judge.

THE COURT: It is?

MR. DOSS: Through Mr. Stanfill, that's correct.

THE COURT: So now we need to do — we need to pick —

[186] MR. DOSS: May I suggest we get two alternates, Judge, since we're going the whole week?

THE COURT: Okay. All right. So the first one would be — and the way we do this, again, is unlimited for cause. Each of you gets one strike for preemptory per alternate, so —

MR. DOSS: So we're going to two now, right?

THE COURT: Yeah. But only one per alternate.

MR. DOSS: Okay.

THE COURT: So Alternate Number 1 would be Number 30, Lucinda Sykes.

MR. DOSS: I thought we — I've got her scratched, Judge.

THE COURT: She stayed on. She was the only one that stayed on —

MR. MOLCHAN: I'll use my preemptory based upon that.

THE COURT: That means the first alternate would be Number 31, Elizabeth Cranford, unless there is cause or Mr. Doss strikes her.

MR. DOSS: I'm fine with Ms. Cranford.

THE COURT: Okay. That brings us up to Alternate Number 2, which would be Joelle O'Daniel-Lopez.

MR. MOLCHAN: I indicate she has a judgment [187] question.

THE COURT: You want to bring her up?

MR. MOLCHAN: Yes.

MR. DOSS: Yes.

THE COURT: Ms. O'Daniel-Lopez, if you could please come up here.

(Prospective juror at the bench)

THE COURT: Hi. When we take notes, sometimes they don't jell. And so I need to ask you something. Earlier today Mr. Molchan asked a question that was — if because of religious or moral beliefs if you'd feel uncomfortable sitting on this type of case or that you couldn't apply the law. What was your answer?

PROSEPCTIVE JUROR: My answer was that, yes, for moral reasons.

THE COURT: Okay. So let me make sure that I understand. Because now it's been a long afternoon and you've heard everything. Is your answer that because of the personal, religious, or moral beliefs, that

despite hearing the evidence and the law and arguments from the counsel that your personal feelings would interfere with being able to apply all that? Is that what you're saying?

PROSEPCTIVE JUROR: I believe so, yes. Okay. Yeah.

[188] THE COURT: Mr. Molchan, any questions?

MR. MOLCHAN: No.

THE COURT: Mr. Doss, any questions?

MR. DOSS: The question I have is, you know, we talked about the whole weighing process as far as the aggravation, mitigation, and the Judge is going to, kind of, give you the process or the guidelines to make a decision. And if you were picked, you'd sit here and you'd hear all the facts and whatever Mr. Molchan had to say about it, whatever I had to say about it, and the Judge would instruct you on the law. Knowing that, do you think you could make a decision, or do you think it's one of those things where even though you had absolutely no disrespect towards the Judge, you would just have to make it a certain way because of what you believe or that you would be able to say, well, you know what, I'm capable of making it based on these guidelines. You see what I'm saying?

PROSEPCTIVE JUROR: I do.

THE COURT: There is no right or wrong answer. Whatever you answer is fine. Nobody, including me, is going to judge you.

PROSEPCTIVE JUROR: I understand the process and I understand how that goes, but I just — I don't know, personally, if I could be responsible.

[189] MR. DOSS: Okay.

THE COURT: All right. Thank you.

(Prospective juror excused)

MR. MOLCHAN: Move for cause.

THE COURT: Any objection?

MR. DOSS: No.

THE COURT: Strike for cause. That brings us, then, to 34 Giovanni Valentine.

MR. MOLCHAN: Nothing from me.

MR. DOSS: None from me.

THE COURT: You want to run both of those by Mr. Hurst and just to make sure?

MR. DOSS: Yes.

It's good. I told Mr. Hurst that there was going to be Cranford and Valentine. He's fine with that.

THE COURT: All right. Then we have our jury.

MR. MOLCHAN: Do we want to go ahead and call them, put them in the box, and take them out the back way, or leave Mr. Hurst where he's at so we don't have to —

THE COURT: Yeah. What I'm going to do, you guys, actually, if you'll just stand at the side, y'all just stand at the side, we'll call them up, and then let them go out. Just give them all the standards, **[190]** don't read anything, don't — we're going to start at nine tomorrow. All right. And then I'm going to excuse the panel after that. If y'all don't my standing. It won't take five minutes.

(Bench conference concluded)

THE COURT: All right. We have finished. So when I call your name — and there are going to be a large number of you — so if you will stand back, but if you will form a semicircle facing me, please. We have David Anderson. We have Melissa Grantham, Kenneth Williams, Sean Preble, Erica Swanson, Jennifer Feliciano, Jonathan Guthrie, James Faxlanger, Roxie Smith, Lauricia Robinson, Kristie Lucas, Tony Stanfill, Elizabeth Cranford, and Giovanni Valentine.

All right. You folks have been — actually, I'm going to stand so I can see everybody. You folks have been selected to try this particular case. It is going to start tomorrow at 9 o'clock. So if you could be here at 8:45, go to jury management, check in, they'll make sure that you get taken care of.

A couple of housekeeping matters: I will have bottled water for you. So if you want to bring it in with you, that's fine. I don't know if anybody has any health issues or anything else, but I will be taking regular breaks about every hour and half. But if you [191] need something like crackers or apple slices or something like that, please feel free to bring it. I have no problem with that.

Again, as you are the jury trying this particular case, the information that you receive on this case must come from this courtroom and this courtroom alone. I don't think it's going to be a big media case, but if it's in the paper, don't read it; radio, don't listen to it; television, don't watch it. Certainly, do not go on the computer and investigate. And let me tell you: The rules are that the information must come from this courtroom so that Mr. Molchan and Mr. Doss hear it and they have the opportunity to challenge the credibility of it. If you go on the computer and look it up yourself,

you're taking away that right for either Mr. Molchan or Mr. Doss. It's against the rules, it's a violation, and really, do not do it. Let everything you get come from this courtroom and this courtroom alone and then we know that the proper procedure has been followed.

Okay. I know it's also strange because y'all are going to be together a lot, but you are not allowed, for those same reasons, to begin deliberating until you have heard all of the evidence, you have heard the arguments from the lawyers, and the [192] instructions on the law from me. So although you're going to be together a lot, talk about the weather, talk about clothes, upcoming summer, whatever, but do not begin talking about this case, what a witness said, because that would be a deliberation. Don't receive information from family members. They're all going to be very curious about why you've been here for so long today. Feel free to tell them that you're on the jury. Do not risk talking about this case or receive information from them as well.

All right. With that, if you would follow the deputy out, then I will then see you in the morning.

PROSPECTIVE JUROR: I have a question.

THE COURT: Yes, ma'am. Hold on just a second.

PROSPECTIVE JUROR: So if I have work, just tell them that I have to be here?

THE COURT: You tell them absolutely that Judge Nobles has said that you have to show up here today, and we'll take care of that for you. I promise.

(Jury excused)

THE COURT: All right. For the rest of you, I know that you are anxious to go home, and I am just

about to let you do that. But I do want to take a moment to talk to you from me to you. Now you have [193] some understanding of why it took us a little longer to get started this day than perhaps some of the other judges because of the fact that we had to go through a number of procedures to get ready for this jury selection. I know for some of you it was a big shock walking in here. But I thank you all for being patient and forthcoming and — when I first start out the instructions, you hear me say that we are all essential coworkers in the pursuit of justice, and I mean that whole-heartedly. My job is absolutely no more or less important than what the attorneys do. Their job is no more or less important than what the jury does. We all come together to pursue justice, and for that, it is a privilege. It's also an obligation. Because if I couldn't get good folks to come down, the system would collapse. And it breaks my heart sitting up here as a judge seeing somebody, and it's pitifully obvious, when folks are trying to get off a jury. I didn't see that today, despite the fact that some of you might have been sorely tempted because of the subject matter. But I saw some really great, honest people giving honest, heart-felt answers, and I thank you for that.

At any rate, at this point in time, you will head down to the second floor. Jury management will tell you, you can go home. Thank you again.

[194] PROSPECTIVE JUROR: Your Honor, I've got a quick question for you. Can I come up there real quick?

THE COURT: Certainly. Sure. Come on up.

PROSPECTIVE JUROR: I'm sorry to take up your time.

THE COURT: Oh, it's not a problem.

PROSPECTIVE JUROR: I'm scheduled to work a 12-hour graveyard. Can I tell — can I be excused for tonight, tell them Judge Nobles told me don't come to work? I'm serious. I didn't get no sleep. Anyway, I was — I'm midnight shift, 12 hours all week long.

THE COURT: Well, you can absolutely tell them that you were summoned to jury service and that you were late and it prevented you from making your job, that's fine. They will actually give you, I think — if you tell jury management, they will give you a piece of paper saying that you were here today until very late.

PROSPECTIVE JUROR: They put the time?

THE COURT: Yes.

PROSPECTIVE JUROR: Thank you.

THE COURT: You're very welcome, sir. And I'm sorry.

PROSPECTIVE JUROR: No, I was expecting to go [195] back in. But anyway, thank you.

THE COURT: You're welcome.

All right. Folks, just procedurally, I just want to get a handle on tomorrow. And, Mr. Doss, I don't know whether you need anything. I know tomorrow is the State's presentation, but I don't — if I can help you in anyway with court admin, I will. I don't know whether you need any projectors or anything. You're just — you're good to go?

MR. DOSS: I'm good to go.

THE COURT: I don't care if you folks want water on your desk. Please feel free to bring some. Actually,

let me tell you, our courthouse will not let you bring it in.

MR. DOSS: I tried today and got shut down, Judge. There's two full bottles of water in the trash.

THE COURT: Well, I will tell — I will tell you how that came about, is because some folks down in Okaloosa County were bringing in water bottles that weren't water. They were vodka and somebody got trashed. They decided that they would stop that. It's not terrorism. It's — I think it's the Redneck Riviera. At any rate, you can certainly buy some on the second floor, or like I said, I'm going to have some, too, for the jury back there and you are [196] certainly welcome to a bottle that I have for the jury. So please feel free to do that. I don't stand on ceremony. There are a lot of judges, that I understand, that are very strict. I'm not one of those. My concept is we all work together to the common goal of getting stuff done and accomplished, so don't stand on ceremony. If you have any problems, let me know.

MR. DOSS: Thank you, Judge.

THE COURT: I had asked Mr. Molchan earlier about opening instructions. If you — he said he was going —

MR. MOLCHAN: I'll send what I have, Judge, which basically says the same stuff I sent you.

THE COURT: Well, and that's what I'm going to ask — I'm going to ask you, Mr. Doss, if what he has sent me, if you have any objection?

MR. DOSS: No, Judge. Mr. Molchan sent me basically jury instruction 711. I don't have any objections to 711.

THE COURT: I read 711 this morning.

MR. MOLCHAN: I think you probably — after all of today's situation, I think we read it again.

THE COURT: I don't mind reading it again, but if there's anything else I'm supposed to read —

[197] MR. MOLCHAN: I'm not aware of anything.

MR. DOSS: I'm not aware of anything either, Judge. The only thing, and I think you mentioned it —

THE COURT: Oh, and I looked to see if there was any mental retardation construction — instruction that had been put in my book. I did not have it.

MR. DOSS: Okay. I'll try to get that together, Judge, and have something later in the week, and I don't think we have to do it right away, but that way I can get it to Mr. Molchan and he can have a response or proposed modifications or whatever it may be.

THE COURT: That's fine. Thank you, everyone, for your patience as well. And we'll call it a night.

(Conclusion of proceedings held 3/5/12)

(Conclusion of Volume I)

IN THE CIRCUIT COURT
IN AND FOR ESCAMBIA COUNTY, FLORIDA

STATE OF FLORIDA,

vs.

TIMOTHY HURST,
Defendant

CASE NO: 1998-CF-001795

RESENTENCING HEARING
TRANSCRIPT OF PROCEEDINGS

VOLUME II

---

* * *

[203] (Proceedings held 3/6/12)

THE COURT: Mr. Doss, would you like a bottle of water? I have some out here. Would you like one?

MR. DOSS: Yes, please, Judge.

THE COURT: Hang on just a second I'll get it. Mr. Molchan, would you like one?

MR. MOLCHAN: Yes, ma'am.

THE COURT: All right. There are a couple of administrative things that I need to take care of and I did not bring my — unfortunately, I left one thing that I'm going to have to go get.

Before we begin, welcome to Division C and the little black cloud that follows. I have received a note from juror Melissa Grantham. She has scheduled movers on 3/8, which I believe is Thursday, to move from

one apartment to another from 8:00 a.m. to 10:00 a.m. She would like to address this.

Now, why she didn't tell us in the multiple opportunities that she had yesterday, I have no idea. But that would be — particularly in light of the fact that Mr. Molchan announced that we would be working from either 8:00 or 9:00 to generally 5:00 in the afternoon.

So, folks, while I run back up to my office, do you folks want to talk about what to do? I'll be [204] right back today.

MR. DOSS: We can, Judge. I before you go, I know you might need to get something else. Mr. Molchan and I are going to discuss that with you whether I can argue to the jury mental retardation is a bar to execution or not.

THE COURT: Thank you.

MR. DOSS: So I don't know if you had something up there you wanted to possibly get to aid in our discussion of that when you get back.

THE COURT: Not sure that I have that handy, that material handy, but what material I do have on that is here.

I'll be right back.

(Recess)

THE COURT: All right.

(Discussion off the record between the Court and the clerk)

THE COURT: Hang on just a moment, Mr. Doss.

(Discussion off the record between the Court and the clerk)

THE COURT: All right. Before we start arguing any motions of any sort, does anyone want to invoke the rule?

MR. MOLCHAN: The State would, Your Honor.

[205] MR. DOSS: I concur.

THE COURT: I don't know who —

MR. MOLCHAN: We have one witness for sure.

THE COURT: — are witnesses and who are just observers.

MR. MOLCHAN: I have one witness in here for sure, Judge.

THE COURT: Mr. Doss, do you have anybody?

MR. DOSS: I have no witnesses here today, Judge.

THE COURT: All right. And yours would be?

MR. MOLCHAN: It's Mr. Brown, Anthony Brown. He's present, Judge.

THE COURT: All right. Sir, if you'll come up here for just one moment.

MR. MOLCHAN: Do you want me to bring all the witnesses in? I've got several witnesses out there. Do you want me to bring all of them in here at once?

THE COURT: Please. Mr. Brown, when they come in, you can just come up here with them and y'all all just face me.

(Witnesses present)

THE COURT: All right. Come on up, folks. If you would do me a favor and just form a semi circle facing me.

[206] I know some of you have heard this before. I'm going to read you a rule of procedure and then I will explain to you in layman's terms what it means.

Each of you has been summoned as a witness in this case. The Court has invoked a rule of procedure which requires your exclusion from the courtroom at all times except during the time when you testify in this case.

You are directed to remain out of the courtroom except for when you're called to testify. While you're waiting to testify and after you have done so, you are not to discuss this case or your testimony among yourselves or with anyone else.

You may, however, one witness at a time discuss your testimony with counsel for either party in this case. Any violation of this direction may not only subject you to contempt of court but may also disqualify you as witnesses in this case.

Counsel for each of the parties is instructed to advise each of its respective witnesses that are not present at this time of the direction that I have just given and each of them shall be governed thereby.

Bottom line is, your testimony should be exactly that, your testimony. It should not be affected by what you hear somebody else say. So for [207] that reason, we keep you out of the courtroom and we keep you away from other folks that are testifying.

And so I'll have a record, let me get your names. Ma'am, starting with you.

THE WITNESS: Tonya Wilson.

THE WITNESS: Cynthia Knight.

THE WITNESS: Michael Berkland.

THE WITNESS: Anthony Brown.

THE WITNESS: Carl Hess.

THE WITNESS: David Kladitis.

THE WITNESS: Lee Smith.

THE COURT: All right. If you folks would step out, we'll call you when we need you.

(Witnesses excused)

THE COURT: All right. Now, I will tell the gallery that the same thing applies for you, folks. You're obviously allowed to stay in and listen, but you are not allowed to go out and start talking about this in front of those folks.

All right. This case is a little bit unusual. I have done death penalty cases from the beginning to the end; this is my first retrial of a penalty phase and it just brings up some unique issues.

I know that the instructions of 7.11 are what normally start the penalty phase; however, usually, [208] they would have gotten the initial instructions. And so it just seems to me that it is a little sparse. So I will raise some suggestions and, of course, hear from counsel what they suggest. Let me turn to 7.11.

All right. Mr. Molchan, do you intend to give an opening?

MR. MOLCHAN: Yes, ma'am.

THE COURT: Mr. Doss, do you intend on giving an opening?

MR. DOSS: Yes, Judge.

THE COURT: All right. It seems to me, then, that what I should do is on the standard instructions, maybe on the opening — and actually if you two could come up here. We can still have it on the record but I think it might make it easier for me.

(At the bench:

THE COURT: If you could look. Mr. Molchan, I've got it right here. Maybe as the jury to try the penalty phase of Florida versus Timothy Hurst, whatever it is. And then maybe skip this.

MR. DOSS: Right.

MR. MOLCHAN: Uh-huh.

THE COURT: And I don't know whether this would apply or not.

MR. MOLCHAN: I'd say skip it because I think [209] that the other one goes into that, the other part of the instruction.

MR. DOSS: Same thing.

THE COURT: And this one as well?

MR. MOLCHAN: Uh-huh.

THE COURT: And then maybe start up with this?

MR. DOSS: I'm good with the rest of the first page, Judge.

MR. MOLCHAN: Yeah. I think that first page — I'm fine with the rest.

MR. DOSS: With the rest of the first page is fine.

MR. MOLCHAN: Uh-huh. Uh-huh.

THE COURT: Okay. And — hold on. Don't go away. We've got a little more because I do need on the record whether you want me to read about the part of his right to remain silent.

MR. DOSS: Yes.

THE COURT: You do want me to read that?

MR. DOSS: Yes, Judge.

THE COURT: Okay. All right. Then what I will do is when I get to the end of this, then I'll start then — I've got note taking.

MR. MOLCHAN: Uh-huh, note taking.

THE COURT: I'm going to give them the [210] opportunity to take notes. But then once I do that then I'll start in —

MR. DOSS: Do you have the instruction about don't rely on your notes over somebody's memory?

THE COURT: (Indicating).

MR. DOSS: Okay. Okay. That's fine.

THE COURT: Then what I'm going to do is give note taking and then go into the 7.1.

MR. DOSS: Okay.

THE COURT: And then allow you folks. I think that gives them a little more.

MR. DOSS: Are you going to skip the first part of 7.11 that you gave yesterday, Judge?

THE COURT: That's exactly what I was going to give again.

MR. DOSS: Okay. Okay. I see.

THE COURT: I was going to read exactly what I did yesterday morning.

MR. MOLCHAN: And stop?

THE COURT: And then stop at the point where I tell them that it is now their duty to advise me.

So I was going to read everything that I was going to say then.

MR. DOSS: Okay. And what I might say — just say as I advised you yesterday and then go into that.

[211] THE COURT: That sounds like a good idea.

Okay. Then you folks can step back.

(Bench conference concluded)

THE COURT: All right. Are there any stipulations or agreements that need to be put on the record?

MR. MOLCHAN: Judge, basically I think Mr. Doss has indicated that James Freeman, who is a witness in the case, is a deputy, he's having a medical procedure done today, we are going to read in his prior testimony. I don't really —

MR. DOSS: That's correct, Judge.

THE COURT: All right. Let's talk about Ms. Grantham and then we'll get into the argument. What do you folks want to do about Ms. Grantham?

I pulled my sheet from yesterday and I am a little bit disturbed because like I said, Mr. Molchan actually gave them the hours and he said 9:00 to 5:00 and then he actually said 8:00 to 5:00.

She's juror No. 7. I'm looking — she gave us no conflict information. She's not one that said we had a conflict — she had a conflict and then came up to ex-

plain it. She gave us nothing. And I don't know whether it slipped her mind or whatever. I don't know whether you folks want to bring her in and ask her [212] questions or whether you just want to take her off or whether you just want to —

MR. MOLCHAN: Judge, I could backstrike and make it easy. That's my — I've got a peremptory. I've only used one.

THE COURT: It's whatever you choose to do.

MR. MOLCHAN: I'd rather go ahead and strike her.

THE COURT: Or we can start at 10:00 other than the fact that I'm not sure that a move will truly take from 8:00 to 10:00 unless she's got a tremendously tiny apartment.

MR. DOSS: What day is it?

THE COURT: Thursday. I mean, I do not know the schedule of y'all's case.

MR. DOSS: Judge, we were — Mr. Molchan and I were discussing it and there's a possibility he may be done today or — if not early tomorrow.

THE COURT: Both of you?

MR. DOSS: No.

MR. MOLCHAN: My part.

THE COURT: Oh, I was about to say —

MR. MOLCHAN: I would say that we'll probably be done, finish today. The State will.

THE COURT: That's fine. I just — okay.

[213] MR. DOSS: I didn't mean to give you false hope, Judge.

THE COURT: It's very rare that attorneys under estimate their time but under estimating by three days might cause me a little consternation.

MR. DOSS: Judge, if we do go in — Mr. Molchan goes into tomorrow, that's fine. I actually in speaking to Mr. Molchan this morning, I had texted my investigator to get in touch with all of the witnesses to tell them to be here tomorrow because originally I was thinking that I wouldn't need them all tomorrow.

So I'm trying to line them all up tomorrow knowing that we're going to do Dr. Wu tomorrow night as well. If we can get through all of them I would have Dr. Taub and Dr. Krop on Thursday. Because Mr. Molchan and I were discussing if that was the case, we could probably close and deliberate on Thursday.

THE COURT: And you're talking about doing — when would you do your closings?

MR. MOLCHAN: On Thursday.

MR. DOSS: Probably Thursday, Judge. Possibly.

THE COURT: All right.

MR. DOSS: And if we strung out a little bit, I think it would be first thing Friday morning.

[214] THE COURT: Well, here — as a Judge I'm always concerned, too, about sequestration. So what I thought you folks were going to do is come back Friday morning, do your closings and then let them go in and argue. I mean but that's strictly up to you.

MR. DOSS: I've got all week blocked out, Judge, so whatever you decide to do is fine with me. You know, we might end up going deep into Thursday anyway. I don't know.

THE COURT: Yeah, it — I really have no idea either but from my uninformed mindset of not knowing your witnesses or your schedule for your witnesses, my goal was to maybe come back at 8 o'clock or 8:30 on Friday, give you folks the opportunity to do your closings and then go directly into instructions and deliberations. That way, I had hoped that I could get them deliberating by 10:00 or 10:30. That was my hope.

MR. DOSS: In my experience — Mr. Molchan and I were talking about this as well, both of our experiences with penalty phase you don't — you don't have as long a deliberation because there's not the requirement of them being unanimous. So it typically lends itself to a little bit quicker process than on the front end on the guilt phase when sometimes we have very lengthy deliberations.

[215] THE COURT: So it makes no difference to me. That was just my thought. So we'll just —

MR. MOLCHAN: As things move along I think we'll see where we're at.

THE COURT: Sure. But that brings us back to Ms. Grantham because I — I mean, I don't mind asking her questions. I don't mind just start something late on Thursday. Or if one of you just wants to strike her, that — I don't care. Whatever you folks want to do. I'm amenable to suggestions.

MR. MOLCHAN: I'll just use my peremptory.

MR. DOSS: I have no problem with her — with Ms. Cranford taking her spot, Judge. I'm not going to object to that.

THE COURT: Then it would be — yeah, Ms. Cranford would be then. All right. Then could you

please retrieve Ms. Grantham and I'll bring her in and tell her she's excused.

SECURITY OFFICER: Yes, Your Honor.

THE COURT: All right. So Madam Clerk, we have the State exercising a strike on Ms. Grantham, which would bring Elizabeth Cranford now onto the panel. We still have Giovanni Valentine — or Valentine as the alternate.

(Juror Grantham present)

[216] THE COURT: Hi, ma'am.

JUROR: Hi.

THE COURT: You can just take a seat, it's fine. Sorry to single you out but you're the only one I got a message from this morning.

I have relayed to counsel the fact that you have movers scheduled from 8:00 to 10:00, I think it's on Thursday.

JUROR: Uh-huh.

THE COURT: I have no idea about the size of your apartment that you're moving from or moving into.

JUROR: Uh-huh.

THE COURT: I am concerned because having dealt with a number of movers over my lifetime —

JUROR: Uh-huh.

THE COURT: — I'm concerned that 8:00 to 10:00 isn't a reliable time frame because sometimes they're late. Sometimes they take longer. I have no idea. But after having talked with the attorneys, we don't want to put you in any concern.

JUROR: Okay.

THE COURT: So we're just going to excuse you off the jury.

JUROR: Okay.

THE COURT: All right?

[217] JUROR: Okay.

THE COURT: I don't know whether that is a relief or whether you are actually looking forward to the process but we thank you —

JUROR: Okay.

THE COURT: — for your time and attention.

JUROR: Okay.

SECURITY OFFICER: Follow me.

JUROR: Okay.

(Juror Grantham excused)

THE COURT: All right. Are there any motions that need to be taken up?

MR. MOLCHAN: Let me go ahead — I'll go ahead and style a motion in limine, Judge.

In conversations with Mr. Doss, he had indicated that he was going to in his opening statement make — or — and it was part of his position that he would be arguing — I shouldn't say the term arguing, but would say that mental retardation, per the statutes and the rule, that the jury could consider that and that would be a — I'll use the term bar or allow the jury to thus seek a — or give a life recommendation.

My motion is not to preclude Mr. Doss from arguing to this jury that it is a mitigating circumstance.

And I don't think that that's what my [218] motion is. But I think to argue to them or give them the impression that that is a factor that is something that they should consider and should subsequently bar the imposition or the use of the death penalty, I think is inconsistent with the rule and it's inconsistent with the statute.

Those — both the statute and the rule look at a very specific procedure that allows the State to appeal those judgments that the Court may make, allows that type of situation.

I would note, also, that the Atkins type of situation has also not been adopted as a statutory mitigator. And it's not in the statutory mitigation list. Be that as it may, I still think it is appropriate to argue that as a mitigator — mitigating circumstance but not to say that it is, in fact, a bar.

Maybe that's — that's my motion that I would have set forth.

THE COURT: Give me just a moment, Mr. Doss, because I found — because I think I actually touched on this in my order that I entered just before I went on vacation and I want to pull it up.

All right. Mr. Doss, go ahead.

MR. DOSS: Yes, Judge. Looking at 921.137, which is the statute that deals with mental retardation [219] and then rule 32.03 is the rule of criminal procedure, honestly, they don't give as much guidance as probably we all would like or — nor do they conform as much as I would like.

However, looking at it, Judge, my position is that under — under Atkins vs. Virginia, retardation is a bar to execution, much like age, and the other categorical

bans on execution. And, Your Honor, noting that fact and coupling that with the Ring vs. Arizona case and its progeny, you look at that and it's clearly a bar to execution if an individual is mentally retarded.

That evidence should be presented to a jury and the jury should be the factfinder as to that. That being a bar, I don't think that — I don't think that it's proper to get up and argue anything less than that it's a bar to execution and that constitutionally, Mr. Hurst is entitled to the jury to be the factfinder as to that particular issue and that's why I had intended and I had told Mr. Molchan beforehand, because I knew we would need to have this argument, as to whether or not it was appropriate, that I do fully intend, unless Your Honor instructs me otherwise, to get up and tell them that if they find that he's mentally retarded, then they should vote for life.

[220] I understand Mr. Molchan's position that I can argue it under the catch-all on the mitigating circumstances. My position on that is as well, Judge, that it's just not — it's just not a near — it understates the importance of mental retardation and it understates the constitutional magnitude of mental retardation as a categorical ban on execution.

And based on those factors, I believe that Mr. Hurst is entitled to have me present it as a bar to execution to the jury.

THE COURT: Anything further?

MR. MOLCHAN: No, Your Honor.

THE COURT: All right. Give me just one moment. All right. While I understand Mr. Doss' argument, I am going to grant Mr. Molchan's motion in limine because while I do think that it is very appropri-

ate as a mitigator, I don't think that it is appropriate to argue it as a bar. All right?

Anything else we need to take up before we bring in the jury?

MR. MOLCHAN: Judge, just for planning purposes, I have a screen over here. I detest the screen behind the witnesses. I mean, I just — it blinds them. It makes it very difficult for any — I've got the screen and when I bring up the witnesses I [221] intend — I would ask that I be able to publish them via the screen. Some of these are — this is an old-day — I'm sorry, I didn't mean to —

THE COURT: That's okay — don't worry with me.

MR. MOLCHAN: But there are smaller photographs and I think we can save — instead of passing them around, we would simply — it may take a little time to position that. So I just wanted to inform the Court that's what I'd like to do if the Court's so inclined.

THE COURT: I have no difficulty. The only thing that I want to make sure is, one, Mr. Doss, do not ask, if he sets up something and the same goes for Mr. Molchan, if you hold up any billboard or something or board, feel free to move around the courtroom until you can see.

The only thing I don't want to have happen, Mr. Molchan, is I don't want to have Mr. Hurst's view of the jury blocked. So as long as you can —

MR. MOLCHAN: I'll move it back.

THE COURT: As long as you can accommodate that, then I have no problem. And you can either set

up in front of the jury if it's going to be short or if you need me to excuse them, just let me know.

[222] MR. MOLCHAN: It shouldn't take very long to set that up, Judge.

THE COURT: All right.

SECURITY OFFICER: Yes, Judge.

(Jury present)

SECURITY OFFICER: Jury's in the box, Your Honor.

THE COURT: Let the record so reflect. Everyone, please be seated. All right. I would be fearful that y'all didn't know about the water except I see one bottle. So that water out there is for you folks.

All right. Ladies and gentlemen, please rise and raise your right hand and the clerk will swear you to try the issues in this case.

(Jury sworn)

THE COURT: All right. Go ahead and be seated.

Ladies and gentlemen of the jury, you have been selected and sworn to try the penalty phase of the State of Florida versus Timothy Lee Hurst. It is the Judge's responsibility to decide which laws apply to this case and to explain those laws to you. It is your responsibility to decide what the facts of this case may be and to apply the law to those facts.

[223] Thus, the province of the jury and the province the Court are well defined and they do not overlap. This is one of the fundamental principles of our system of justice.

Before proceeding further, it will be helpful if you understand how the trial is conducted. At the beginning of the trial, the attorneys will have an opportunity, if they wish, to make an opening statement. The opening statement gives the attorneys a chance to tell you what the case is about and what evidence they believe will be presented during the trial. What the lawyers say is not evidence and you are not to consider it as such.

Following the opening statements, witnesses will be called to testify under oath. They will be examined and cross-examined by the attorneys. Documents and other exhibits also may be produced as evidence.

After the evidence has been presented, the attorneys will have the opportunity to make their final argument. Following the arguments by the attorneys, the Court will instruct you on the law applicable to the case.

After the instructions are given, you will retire — you will retire to consider your verdict.

[224] You should not form any definite or fixed opinion on the merits of the case until you have heard all of the evidence, the arguments of the lawyers, and the instructions on the law from me. Until that time, you should not discuss the case among yourselves.

During the course of the trial, we may take recesses during which you will be permitted to separate and go about your personal affairs. During these recesses, you will not discuss the case with anyone nor permit anyone to say anything to you or in your presence about the case.

If anyone an attempts to say anything to you or in your presence about the case, tell that person that you

are on the jury trying the case and ask that person to stop. If he or she persists, leave their presence at once and immediately report the matter to the security officer, who will, in turn, advise me.

The case must be tried by you only on the evidence presented during the trial, in your presence and in the presence of the defendant, the attorneys, and myself.

Jurors must not conduct any investigation of their own. This includes reading newspapers, watching television, or using a computer, cellphone, the internet, any electronic device or any other means at [225] all to get information related to this case or the people and places involved in this case. This applies when you are in the courthouse, at home, or anywhere else.

You must not visit places mentioned in the trial or use the internet to look at maps or pictures to see any place discussed during the trial.

Jurors must not have discussions of any sort with friends or family members about the case or the people and places involved. So do not let even the closest family members make comments to you or ask questions about the trial.

And just as you must not talk about this case face to face, you must not talk about this case by using an electronic device. You must not use phones, computers or other electronic devices to communicate. Do not send or accept any messages related to this case or your jury service.

Do not discuss this case or ask for advice by any means at all including posting information on an internet website chat room or blog.

In every criminal proceeding, a defendant has the absolute right to remain silent. At no time is it the du-

ty of a defendant to prove his or her innocence. From the exercise of a defendant's right to remain [226] silent, a jury is not permitted to draw any inference of guilt and the fact that a defendant did not take the witness stand must not influence your verdict in any manner whatsoever.

The attorneys are trained in the rules of evidence and trial procedure and it is their duty to make all objections they feel are proper. When an objection is made, you should not speculate on the reason why it is made. Likewise, when an objection is sustained or upheld by me, you must not speculate on what might have occurred or what a witness might have said had he or she been permitted to answer.

If at any time you do not hear me, the attorneys or any witness, please indicate by raising your hand and I will have the appropriate person repeat their words.

If you could hand out the pads.

If you would like to take notes during the trial, you may do so. On the other hand, of course, you are not required to take notes if you do not want to. That will be left up to you individually. You will be provided with a notepad and a pencil for use if you wish to take notes. Any notes that you take will be for your personal use. However, you should not take them with you from the courtroom until you are released [227] to begin your deliberations.

During recesses, the security officer will take possession of your notes and will return them to you when we reconvene. After you have completed your deliberations, the security officer will deliver your notes to me. They will be destroyed. No one will ever read your notes.

If you take notes, do not get so involved in note taking that you become distracted from the proceedings. Your notes should be used only as aids to your memory. Whether or not you take notes, you should rely on your memory of the evidence and you should not be unduly influenced by the notes of other jurors.

Notes are not entitled to any greater weight than each juror's memory of the evidence. I ask regardless of whether you take notes or do not take notes on the very front page if you will write some identifying information. Then if you choose to take notes, start on the second page so that when we grab all of the pads and hold them together, we know who to give them back to without breaching anyone's confidentiality.

All right. As I stated yesterday, the defendant has been found guilty of murder in the first degree. An appellate court has reviewed and affirmed [228] the defendant's conviction. However, the appellate court sent the case back to this Court with instructions that the defendant is to have a new trial to decide what sentence should be imposed. Consequently, you will not concern yourself with the question of his guilt.

The punishment for this crime is either death or life imprisonment without the possibility of parole. The final decision as to which punishment shall be imposed rests with the Judge of this Court. However, the law requires that you, the jury, render to the Court an advisory sentence as to which punishment should be imposed upon the defendant.

The State and the defendant may now present evidence relative to the nature of the crime and the character, background, or life of the defendant. You are instructed that this evidence is presented in order that you might determine first whether sufficient aggravat-

ing circumstances exist that would justify the imposition of the death penalty and, second, whether there are mitigating circumstances sufficient to outweigh the aggravating circumstances, if any.

At the conclusion of the taking of the evidence and after argument of counsel, you will be instructed on the factors in aggravation and mitigation [229] that you may consider.

Counsel for the State will proceed first followed by counsel for the Defense. Mr. Molchan.

MR. MOLCHAN: Thank you, Your Honor. Mr. Doss.

Good morning, folks. Let me reintroduce myself. I am John Molchan. Of course, we spent the long afternoon yesterday in jury selection and certainly it would not be surprising if you've forgotten names and faces and things like that.

But based on what has gone on, we're going to give what's known as an opening statement, myself as well as Mr. Doss. Not anything that we say is evidence for use — for you to use as evidence. In essence, what you're going to consider is going to come from the witness stand, from the lips of the people who testify and the exhibits that we bring into this case.

Now, as the Court has indicated, this is the penalty phase in which you, the jury, will consider the aggravating factors, the mitigating factors, and then engage in a weighing process. And the Court — we are going to talk about those — I'm sure Mr. Doss and myself, we'll talk about those, but the instructions will be given to you at the end so you'll have a written one to look at. So that will be there for you [230] to rely upon at the close.

The facts and the evidence in this case will show that on May the 2nd of 1998, Cynthia Harrison, along with the defendant, were scheduled to open up a Popeye's on Nine Mile Road that morning at 8 o'clock. Ms. Harrison was an assistant manager. Mr. Hurst was the person basically who was involved. They were going to start at 8 o'clock with the food preparation.

The evidence will show that basically, at around 8:30, 9 o'clock, other employees became — would start showing up along — you know, to get there. And what they found was that they couldn't get in. Mr. Anthony Brown got there and knocked and nobody answered the door. And when the workers finally did go in, there was also I think a truck driver that was delivering, they couldn't get in, but they finally managed to get in when another assistant manager got there and they found two distinct, significant problems.

When they got inside, they basically found the safe had been opened. It was opened and there was money missing. And secondly, tragically, they found the body of Cynthia Harrison in the freezer and she was then deceased.

The person who was not there — and again, the [231] Court is going to indicate to you and instruct you that you are not to concern yourself with the guilt of Mr. Hurst. That's already there. He has been found guilty. And so what my presentation will be, is really about the aggravating factors that we think are established beyond a reasonable doubt.

Now, ultimately, the investigation led to Mr. Hurst's arrest and conviction. And would I assert to you that there are two primary aggravating factors for your consideration. The first is that the murder of Cynthia Harrison occurred while in the defendant was

in the commission of a robbery of the Popeye's, that being the first. We're talking about money.

The second is that the murder was done in what's known as a heinous, atrocious, or cruel manner.

We're going to talk about that as we go through these particular aspects.

The evidence will show basically that the defendant worked at Popeye's, had worked with Ms. Harrison during a number of months prior. The evidence is going to show that the safe was unlocked and that the defendant did not have the combination to that. He did not have the combination to the lock that would open the door that would provide him the money; that was with Ms. Harrison.

[232] At the scene, there was a deposit slip for about — for $1751.54. There was no cash present. A plastic container that they also kept change in of about $375, it would have a deposit slip, and there will be a witness, a Ms. Cynthia Knight that will talk about the process they would normally go through.

The night before, that deposit would be made and then an ongoing shift person would take that deposit, deposit that and there would be also change left over also for the start of the next day's business. So that was the normal course of business.

So in essence, the deposit is gone from the night before and the change that is kept is gone and there was a plastic container that was kept.

She'll also confirm that the defendant and Ms. Cynthia Harrison were the persons assigned to go that morning. So it will be clear to show that on May 2nd, 1998, the Popeye's store was robbed because a robbery basically is taking — stealing with force.

Because the evidence will lead to a person by the name of Lee-Lee Smith, who will testify and talk about that afterwards the defendant came to his house, brought money. He actually sees blood on his pants and the defendant is told to wash them. That money was hid at Mr. Smith's house. Mr. Smith was 15 years of age at [233] this point in time. Also had the license of the victim, the wallet, and those were thrown away in the garbage can that were ultimately recovered. He admits to Mr. Smith that he killed her and he cut her up — or cut her.

The crime scene investigation at Mr. Smith's house locates the Tupperware container, which will be identified as coming from the Popeye's, pairs of shoes worn by the defendant; driver's license, socks in the trash can, the First Union Bank bag, a deposit slip, and socks with blood on them. All were deposited in that garbage can at Mr. Smith's house per the instructions of Mr. Hurst.

So again, this links up this idea that it was done in the course of a robbery, that there was a monetary gain that was coming into play.

Now, the other aggravating factor is one that is done in a specially heinous, atrocious, or cruel manner. And I will define and I anticipate the Court is going to define these words to you. And again, you'll have these instructions for your consideration at the close for your deliberations.

I anticipate that the Court will instruct you that heinous means extremely wicked or shockingly evil. Atrocious means outrageously wicked and vile. Crime — [234] cruel means designed to inflict a high degree of pain with utter indifference to or even enjoyment of the suffering of others. The kind of crime intended to be

included is heinous, atrocious or cruel is one accompanied by an additional act showing that the crime was conscienceless or pitiless and was unnecessarily torturous to the victim.

Now, at the crime scene Dr. Berkland was there along with other persons. Dr. Berkland was then associate medical examiner. And they really — at that point in time he would go out to the scenes on certain types of cases. This is one of them. And the evidence that establishes this heinous, atrocious and cruel becomes self-evident at the crime scene. Because we find Ms. Cynthia Harrison bound with black electrical tape. Her hands are bound and her mouth is bound with black electrical tape. She is cut, Dr. Berkland said after the autopsy over 60 times, about 61 times. There are slashes across her throat, across her face, across her back, across her chest that led her to bleed to death. There was also a severed artery.

She was four foot eight and weighed 86 pounds. This is, again — there will also be parts of this autopsy that show and establish the connection between the robbery and the death. Because what also [235] Dr. Berkland found at the scene or what was found at the scene was a box cutter. And Dr. Berkland will indicate that the injuries and the wounds on Ms. Harrison were consistent with that of a box cutter.

And then also on her body — this is where the combination is, the relationship between heinous, atrocious and cruel and done in the course of the robbery, because you'll remember that the evidence is going to show that the defendant did not have the combination but on Cynthia Harrison's lifeless dead body, there are also poking wounds as I would suggest to you the evidence is going to show that the defendant took that box

cutter and poked her and poked her. And why? The safe. You can use your common sense and experience in analyzing that.

But in this situation, Ms. Harrison, a four foot eight, 86-pound woman, was not a threat, was clearly not going to prevent the defendant from stealing or robbing when she is bound and tossed in the freezer. Remember, conscienceless or pitiless and unnecessarily torturous to the victim.

The State's position is that, again, there will be a great deal of — or aggravation will be established. We think we'll establish it beyond a reasonable doubt. And at the close, I will ask that [236] you return a recommendation of death in this particular matter. Thank you.

THE COURT: Mr. Doss.

MR. DOSS: Thank you, Judge.

Good morning. This is a — I know whenever you came down yesterday, you didn't realize what you were getting yourself into as far as sitting on a case with the magnitude of what your decision is going to be. The State's told you and filled you in on the details that they feel is important regarding the murder of Cynthia Harrison. And we're not here to dispute whether or not Cynthia Harrison's dead. We're not here to dispute whether or not it was a tragic death because it absolutely was. There's no — there's no denying that. That's not what we're here to do. We're here to determine what's the appropriate sentence for Mr. Hurst's involvement in this as the jury that sat before you found.

However, there's facts and circumstances that we're going to present regarding how this happened.

The reason Mr. Molchan and I both talk about what happened is so that you can have a context of what it is that happened and how it is that you're to judge that and then how you're to apply those facts in your weighing process to determine exactly what it is that's [237] the appropriate punishment.

Whenever you're doing that, there are some facts that I think will be very important. We intend upon presenting evidence of where Mr. Hurst was that day, alibi witnesses to show that Mr. Hurst was not at that Popeye's. And it's not —

MR. MOLCHAN: Judge, I object at this point in time.

THE COURT: All right. Approach, please.

(At the bench:

MR. MOLCHAN: The objection is lingering doubt. Judge, this is not appropriate. Any type of lingering doubt argument is, evidence is inappropriate at this stage.

MR. DOSS: And I'm not arguing lingering doubt, Judge. Under Tyson versus Arizona I can argue he's not, he's not a death penalty candidate because he's not a major participant and didn't act with reckless indifference to human life.

At trial it was presented by the Defense that Lee-Lee Smith was the real perpetrator and that Mr. Hurst was elsewhere. Obviously, the jury didn't believe that he wasn't involved but what level of involvement, that's for this jury to decide. And so I can argue regarding the level of involvement. If this [238] wasn't a co-defendant — you know, a co-defendant or multiple perpetrator kind of case, I would fully agree with Mr. Molchan. But I'm not here to argue about lingering doubt.

I'm here to argue about what his role was. I'm not denying guilt. That's why I phrased it the way I did as far as we're not disputing what the jury found. It's merely context to argue what we're entitled to under Tyson.

MR. MOLCHAN: He used the term alibi and that he was not there. Now, that's an innocence argument, Judge, no matter how you slice it.

THE COURT: Would I agree with Mr. Molchan. When you're using the word alibi, the connotation is exculpatory as in not there at all.

Now, I don't know whether you want to try to reword because I think you are entitled to argue the level of involvement, but what it sounded to me was total exclusion.

MR. DOSS: I won't say alibi. I'll phrase that he wasn't a major participant. I have no problem with that.

MR. MOLCHAN: I can't — that's different than —

THE COURT: I agree.

MR. DOSS: I didn't get the same connotation [239] from alibi. I understand what both of you are saying. I won't use alibi here.

THE COURT: Okay. Thank you.

(Bench conference concluded)

MR. DOSS: But we're going to present evidence that Mr. Hurst was not the major participant in this case. To put it into context, we're going to present evidence that Mr. Hurst actually woke up at 7:45 that morning. You're going to find that there's a small window when this could actually happen. Mr. Anthony

Brown is going to come in and say that he got there at 8:05. You've got a really small window of time whenever this crime could have happened if you think that Mr. Hurst was the major participant. Again, we're not arguing guilt or innocence, we're arguing whether he was the major participant or not.

You're going to find that whenever Mr. Hurst left his house that day, he was having car trouble, having problems with his battery, had to go out, put the battery in the car, still having problems, and that he went to an individual named Aundra Cary's house to use the phone, then he went to the Jr. Food Store that was in his neighborhood, still having car troubles, went to a man named Aldwin Dees' home trying to call Lee-Lee Smith. Went over to Lee-Lee's house. Then **[240]** Lee-Lee Smith and Mr. Hurst actually went back over to Mr. Hurst's home. He still lived with his parents at that point in time. Lee-Lee Smith was 15; he was 19.

At home was his mom, was his dad, was his brothers. I'll hear from them, that they were there and he came — and he came back home and that then him and Lee-Lee and his brothers went up to Wal-Mart and bought some shoes and that Lee-Lee gave Tim some money to buy those shoes.

They go across to the pawn shop, buys his brothers a couple of items from the pawn shop because they're not 18. They've got to give him the money. But then comes back later and uses some money to buy some rings. Then later on, you're going to — we'll walk you through the rest of the day so that you can — you can see what kind of context we have as far as where Mr. Hurst was, what he was doing so you can determine whether or not he was the major participant in that.

Now, when we're presenting this, the other kind of evidence that we're going to present is something that we were talking about a little bit during jury selection, which is you're going to find from two doctors that are presented, a Dr. Krop and a Dr. Taub, are going to come and they're going to [241] testify — they're going to testify as to testing that was done upon Mr. Hurst and that based on the IQ scores that were obtained, based upon the different testing that was done, the different interviews that were done, that they believe that Mr. Hurst is mentally retarded. That he's very low functioning. You're going to hear from a Dr. Wu who did a PET scan of Mr. Hurst's brain, that he has brain damage up in his frontal lobe and he's going to explain to you what that means, exactly what that area of the brain controls and how that affects somebody's ability to make decisions.

You're going to hear Tim's mom come in and she's going to testify that she was a teen-aged mom and she had an alcohol problem and drank every day when she was pregnant with him every day until she got drunk not just — not just a drink but significant amounts of alcohol. You're going to find that as he was growing up, that when she was a single mom, that DCF actually took him away for a while until she could get some suitable housing. And that he was returned from foster care back into her care.

You're going to find that during the period of time he was growing up, that he was raised by his stepfather and his mom but that discipline in the home was very harsh; that Tim was kind of the black sheep of [242] the family so to speak, the scapegoat because he's the big, slow guy and he was the protector for his siblings and took a lot of — took a lot of the beatings.

Then we're going to bring in some people to tell you what he was like at that time and how he performed in school. We're going to bring in some principals and assistant principals that are going to tell you that Tim was low functioning; that Tim was very low functioning in school, that he had a very difficult time in school. That he was actually someone that, even though he was — he was very large, bigger than he is now, that he was — he was picked on, picked on because he's the big, slow kid and that to cover that up, he was the jokester. He was also master of profane language to kind of fend everybody off.

Why is that relevant? We're going to present it to you because much like Mr. Molchan was talking about aggravating circumstances for you, we've got mitigating circumstances that we present to you so that when you're considering this weighing process back and forth, the context that we have through the witnesses that will be on the witness stand as to what decision that you're going to ultimately make, you need those facts so that you can make an informed decision so that you can make a conscientious, responsible decision as [243] to, are you going to vote for life or are you going to vote for death? Because you're going to have to determine whether these aggravating factors outweigh the mitigating factors.

As you're looking at it, the ones that we're going to present, there's — the mitigating factors are a little bit different in that there's statutory mitigating factors much like Mr. Molchan was talking about with the aggravators, okay, but then there's well one that allows for us to present and you to find any other mitigating factors in Mr. Hurst's background, character or life that tend to establish that you should give him a life sentence.

Along with — along with those and that's why we kind of cast our net wide is because things that — things that you find mitigating, maybe somebody else doesn't find mitigating. But the law doesn't restrict you on those mitigators. And that's why we cast that wide net to present Mr. Hurst's life to you to determine what it is that you think you should vote.

As well, within the mitigating factors we're going to present to you that his ability to conform his conduct to the law was substantially impaired due to that low mental functioning that we were talking about.

We're going to present to you that he was — [244] he was very young. He was even younger than his chronological age of 19. You're going to hear testimony from the doctors, testimony from the principals that he really operated more down in that ten to twelve year old range as far as the way that he was able to deal with people.

The other thing that we're going to present to you is you're going to find that Mr. Hurst had no prior criminal history prior to this event; that there's nothing out there as far as him being involved in criminal activity. And that's something that we submit to you hoping that you find that that weighs toward giving him a life sentence.

And as well, I touched on this a little bit before that we're going to present to you that Mr. Hurst wasn't the major participant here. He wasn't the major participant and that he doesn't deserve to be sentenced to die.

And we're going to be asking you for a life sentence. We're going to come back at the end of the — at the end of the case just like Mr. Molchan's going to come back at the end of the case to kind of sum up what

you had seen. And what we say is not evidence. It's just to give us — to give you a different perspective of the evidence maybe to try to help you [245] pull it altogether. But I can assure you that I'm going to come back up here and I'm going to be asking you to vote for life and to come back and tell Judge Nobles that Tim Hurst should receive a life sentence.

Thank you.

THE COURT: Mr. Molchan.

MR. MOLCHAN: Call Anthony Brown. Judge, where do you want the podium to be positioned for counsel?

THE COURT: You can move it wherever you would like. Are you setting up the screen at this time?

MR. MOLCHAN: No, not yet, Your Honor.

THE COURT: Okay.

MR. MOLCHAN: Let me put this back because I don't want to block them.

SECURITY OFFICER: Mr. Brown, please stand by that chair, please. Face Madam Clerk. Raise your right hand to be sworn.

(Witness sworn)

THE COURT: Go ahead and take a seat, sir. You sound like you're a bit soft spoken. Make sure to speak into the microphone and it does move up and down if you want to get it closer to you. All right, Mr. Molchan.

[246] WHEREUPON, ANTHONY BROWN,
having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MOLCHAN:

Q. Could you state your name, sir?

A. My name is Anthony Brown.

Q. And how old are you now, sir?

A. Thirty.

Q. Now drawing your attention back to May of 1998, how old were you then?

A. About seventeen. Seventeen or eighteen.

Q. Okay. And were you working at any particular place in May of 1998?

A. Yes sir, I was working at Popeye's.

Q. And did you know a person by the name of Timothy Hurst?

A. Yes, I knew him.

Q. Is he in the courtroom today?

A. Yes, he is.

Q. If you could, could you point him out and describe what he's wearing?

A. He's got on a green shirt.

Q. And where is he seated?

A. (Pointing).

[247] Q. In front of you?

MR. MOLCHAN: Let the record reflect he's correctly identified the defendant.

THE COURT: It shall so reflect.

Q. (By Mr. Molchan) Now back on the morning of May the 2nd, I believe that was a Saturday morning. Were you supposed to go to work at Popeye's?

A. Yes.

Q. About what time were you supposed to get there?

A. I was supposed to have been at work at 9 o'clock.

Q. Okay. And where were you living at that point in time in relationship to the — to the Popeye's?

A. I was staying on 1540 Lepley Road.

Q. And how is it that you would come to get to work?

A. My mother.

Q. And why was she taking you to work?

A. Because I didn't have no car at the time.

Q. Okay. And was she working near this location?

A. Yes, she was.

Q. And where was she working?

A. She was working at Church's Chicken on Highway 29.

[248] Q. Okay. Now, you didn't have to be at work until when, sir?

A. Until 9 o'clock.

Q. Now, on that date, about what time did you leave to — or arrive at the Popeye's, approximately?

A. I got there between 8:05 and 8:15.

Q. And did you — could you get into the Popeye's?

A. No, I couldn't.

Q. Did you try?

A. No, sir. I helped bam on the window for somebody to come and that's what did I.

Q. Now, did you notice any cars in the parking lot?

A. Yes, I did. Miss Cindy's car was there at the time.

Q. Miss Cindy's car was there at the time?

A. Yes, sir.

Q. Any other cars?

A. No, sir.

Q. And while you were there, you said that the door was locked?

A. Yes, sir.

Q. And did — what did you — how did you try to get entry in?

[249] A. I didn't. I just bammed on the door and then after that, I waited until somebody else came.

Q. Okay. And who else came?

A. The truck guy — the truck guy came like five minutes later.

Q. Now when you mean truck guy, what are we talking about?

A. The person who bring all the — the supplies to the store.

Q. Okay. That's kind of a delivery guy?

A. Yes, sir.

Q. Okay. And you said that Miss Cindy's car was there. Where was it parked, approximately? Where was it parked; do you recall?

A. It was parked like right directly in front of the Popeye's in the second parking lot.

Q. Now, were — did anybody — had any — yourself, the delivery guy is there. Are you joined by anybody else?

A. Not at the particular time. They didn't come until like maybe two hours later.

Q. That long?

A. Yes, sir.

Q. And who is it that came?

A. Another employee named Aundra, I think. I [250] think that was his name, Aundra.

Q. Did he — was he — did he get y'all inside?

A. No, sir.

Q. Now, who — who was it that basically got you inside of the store?

A. The other manager.

Q. Do you remember her name?

A. I can't think of it right now.

Q. But were you joined then by another manager or assistant manager?

A. Yes, I was.

Q. And you and the other guy didn't have keys?

A. No, sir.

Q. And she had keys?

A. Yes, she did.

Q. And what happened as you — what happened when she got there then?

A. When she got there, we had all walked around to the door and she was like, why y'all still out here? We was like we waiting on — we knocked on the door and Miss Cindy did not come to the door so we had to wait out here. And she was like, well, I'm not going in there by myself. And then once we had did that, we all went in the store together. Then I had went past the [251] freezer. Everybody started calling her name. I had went past the and when I went past the freezer, the truck guy went in the freezer and found her.

Q. And basically after that, were the police called?

A. Yeah, the police was called.

Q. And on that date, did you see Mr. Hurst at the Popeye's there that morning at any point in time?

A. No, sir.

MR. MOLCHAN: No other questions of the witness, Your Honor.

THE COURT: Mr. Doss.

MR. DOSS: Thank you, Judge.

CROSS-EXAMINATION

BY MR. DOSS:

Q. Good morning, Mr. Brown.

A. Good morning.

Q. Now back then, you knew what Mr. Hurst's car looked right — looked like, right?

A. Not for sure. I think he had a Lincoln. I'm not for sure.

Q. But at the — but at the time, you were familiar with it?

A. Yeah.

Q. I know it's a lot of years later now.

A. Yeah, I'm familiar with it.

[252] Q. But you don't remember seeing that car that morning, right?

A. No, sir.

Q. Now, when you first got — got there, did you know what — when you first arrived, you knew that Mr. Hurst was scheduled to work at 8:00, right?

A. Yes.

Q. But you also know that he used to — he used to call in to work a lot and not show up, right?

A. Yes.

Q. And that's what you thought initially, was that Mr. Hurst had just called in?

A. Yes, sir.

Q. That you were going to end up working by yourself?

A. Talking about that particular day? Yeah, when I came to work — that day when I had came to work, the other manager opened the door, we didn't get a chance to work, because we ended up calling the police or whatever.

But normally when somebody called in, I have to catch up everything.

Q. Right. Now, what — what kind of car was it that your mom drove?

A. At the time, she had a red Pontiac.

Q. Did you see anybody else other than the people [253] that you were telling us before — about before earlier as far as Aundra and the delivery driver and then Ms. Crenshaw got there? Did you see anybody else at the Popeye's that morning?

A. No, sir.

Q. And during this period of time, do you remember as far as Mr. Hurst wearing black Reeboks?

A. No, sir, I don't remember what kind of shoes he had on.

MR. DOSS: If I can have one second, Judge.

Q. (By Mr. Doss) Mr. Brown, do you remember — I know it's been a long time. Do you remember giving a deposition way back — whenever this case first started?

A. Yes, I remember.

Q. And you were sworn to tell the truth back on that day, right?

A. Yes, sir.

MR. DOSS: Judge, if I can approach the witness?

THE COURT: Sure.

Q. (By Mr. Doss) If you'll look at —

MR. DOSS: I'm sorry, page 5, line 8, Mr. Molchan.

Q. (By Mr. Doss) Look at line 8 and please read that question and answer to yourself, sir.

[254] Does that refresh your recollection, sir, as to what color shoes Mr. Hurst wore back then?

A. I guess so.

Q. And it was black, right?

A. Yeah, it was black.

MR. DOSS: No other questions, Judge.

REDIRECT EXAMINATION

BY MR. MOLCHAN:

Q. Mr. Brown, even back then, did you remember exactly what — who was wearing which type of shoes, even back then in 199 — I think this would have been 1998.

A. I'm not — I can't — can't really remember, it's been so long ago.

MR. MOLCHAN: No other questions, Judge.

THE COURT: May he be excused?

MR. MOLCHAN: As far as the State's concerned, he can be excused, Your Honor.

THE COURT: Mr. Doss?

MR. DOSS: Yes, Judge.

THE COURT: Thank you, sir. You're free to go.

MR. MOLCHAN: Call Ms. Tonya Wilson — Wilson.

SECURITY OFFICER: Step up by the chair, please. Face Madam Clerk. Raise your right hand to be sworn.

[255] (Witness sworn)

THE CLERK: Thank you.

THE COURT: All right, ma'am. Go ahead and take a seat. You sound like you are fairly soft spoken so make sure you speak up and directly into the speaker.

Mr. Molchan.

MR. MOLCHAN: Thank you, Your Honor.

WHEREUPON, TONYA R. CRENSHAW WILSON, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MOLCHAN:

Q. Could you state your name, please, ma'am?

A. Tonya Renee Crenshaw Wilson.

Q. Okay. Now, back in May the 2nd of 1998, how were you employed? Where were you working then?

A. Popeye's.

Q. And where was that location?

A. On Nine Mile Road.

Q. And what was your position there?

A. Assistant manager.

Q. Now, drawing your attention going back to that time frame, specifically to May 2nd of 1998, were there other assistant managers that worked at the Popeye's?

[256] A. Yes.

Q. And who — who is one of them? Do you remember who they were?

A. Cindy Harrison.

Q. Okay. Now, on May the 2nd of 1998, what time were you scheduled to come in to work?

A. 11:30 a.m.

Q. And did you come a little bit earlier than that?

A. Yes.

Q. Okay. About what time did you get there?

A. About 10:30.

Q. Now, at the time you got there, did you notice there was a problem?

A. Yes.

Q. And what did you find when you got to that store?

A. I saw the delivery driver and one of the employees outside.

Q. Now, who was supposed to be scheduled to work? And if you can kind of explain how the working arrangements went at the Popeye's. Who was supposed to be working there first on that morning?

A. Cindy as assistant manager and Timothy as the prep was supposed to open up.

[257] Q. And were you able to just go inside the business when you got there? Just I mean walk in without unlocking it or anything like that?

A. No.

Q. Was it locked?

A. Yes.

Q. And when you — did you go — did you unlock the door then and go inside?

A. Yes.

Q. Now, what did you find after you got inside?

A. It was dark so I turned the lights on. I saw all the papers on the floor. The safe was open. And the drive-through window open.

Q. Now, was the safe supposed to be open?

A. No.

MR. MOLCHAN: I'm showing Mr. Doss what's been marked as State's Exhibits 10 and 9.

If I can approach the witness, Your Honor.

THE COURT: You may.

Q. (By Mr. Molchan) I'm showing you what's I guess been previously admitted as State's Exhibits 10 and 9. Do you recognize State's Exhibit first No. 10?

A. Yes.

Q. And what is State's Exhibit No. 10?

A. The safe.

[258] Q. Is that a photograph of the State — safe as it appeared on May the 2nd, 1998, as you found it?

A. Yes.

MR. MOLCHAN: Now, Judge, these are already in evidence. I'm not — do we have any —

THE COURT: That's fine.

MR. MOLCHAN: For the record purposes.

THE COURT: That's fine.

Q. (By Mr. Molchan) And then as far as State's Exhibit No. 9, what does State Exhibit 9 depict?

A. That's the paperwork, the deposit slips.

Q. Now, how is it that the deposit slips, how would that process work and go on?

A. What we do is when we come in the next day, we count the deposit and place it in the deposit slip bag and take it to the bank.

Q. Now, you indicated that you found this part of it. Did you find Ms. Harrison inside — or in the Popeye's area in the store area?

A. No.

Q. Who tried — you said there was a truck driver along with some other employees. How is it that you came across or found Ms. Harrison?

A. When I arrived at work, I was informed by the employee and the delivery driver that something was wrong. [259] So once we got inside the store, they went to the back to search the store.

Q. And is that where she was — she was located?

A. Yes.

Q. Now, the safe that we're talking about that was depicted in State's Exhibit 10, what should have been inside the safe as a normal course of business?

A. The —

Q. And specifically, money, money wise?

A. The money from the night before, the — the deposit money that was made from that day and then the money that we used to put in the drawer for like change throughout the day.

Q. Are they kept separate?

A. Yes.

Q. And then who would fill out the deposit slips?

A. That manager — that assistant manager that night before that closed out the store.

MR. MOLCHAN: Showing Mr. Doss State's Exhibit 20.

If I could approach the witness, Your Honor.

THE COURT: You may.

Q. (By Mr. Molchan) I'm showing you what's been previously marked as State's Exhibit 20. Do you recognize State's Exhibit 20?

[260] A. Yes.

Q. And how — how is it that you're able to recognize that?

A. It's a deposit slip.

Q. Is it something that pertains to the Popeye's?

A. Yes.

Q. And what — is there a name on that that you recogniz[illegible] and a signature?

A. Yes.

Q. Whose signature?

A. Cynthia's.

Q. Cynthia Harrison?

A. Yes.

Q. Okay. Now, there was an amount on there, also. That would have been the amount of the deposit, any monetary numerations on there would have been the total amount of the deposit?

A. Yes.

Q. Now, how was the deposit kept in the regular course? What — what type of packaging would be done? How would it be packaged from the standpoint of a — what was used?

A. We would place it in the deposit bag.

MR. MOLCHAN: I'm showing Mr. Doss what's been previously marked as State's Exhibit 18.

[261] If I can approach, Your Honor.

THE COURT: You may.

Q. (By Mr. Molchan) Showing you what's been previously marked and admitted as State's Exhibit No. 18. Do you recognize that?

A. Yes.

Q. Is that — what is State's Exhibit No. 18?

A. It's a deposit bag.

Q. And again does that have a notation or a name on that?

A. Yes, Cynthia.

Q. Is that the kind of bag that was used by you and other assistant managers in packaging the night deposit?

A. Yes.

Q. Okay. Now, the safe that we're talking about, who would have had the combination to the safe that is depicted in State's Exhibit No. 10, that photo?

A. The manager and the assistant manager.

Q. And that would have included Cynthia Harrison?

A. Yes.

Q. Would Mr. Hurst have had a combination to that safe?

A. No.

MR. MOLCHAN: Judge, at this time, I'd go ahead and move to publish those documents, the [262] photographs. If I can just take a little —

THE COURT: That's fine.

MR. MOLCHAN: I'll have to move the screen a little.

THE COURT: That's fine.

MR. MOLCHAN: Is that okay where we're at?

MR. DOSS: (Nods head affirmatively).

MR. MOLCHAN: Your Honor, at this time I'm publishing — I'll go numerically. State's Exhibit No. 9.

THE COURT: And folks, I will tell you that you will have these exhibits to take back with you when you deliberate.

MR. MOLCHAN: That's No. 9.

THE COURT: And Mr. Molchan —

MR. MOLCHAN: Yes.

THE COURT: — do you want me to lower the lights at all? I can actually see through the back of the screen the exhibits but I can't see if there's any glare on the front.

Do you want me to turn the lights down?

JUROR: I'm fine.

THE COURT: Everybody's fine? Okay.

MR. MOLCHAN: That's No. 10. That's No. 18. I'll have to come back a little bit. Let me go ahead [263] and this screen. Again, Judge, just so they know they can take these back and look at them.

THE COURT: Do you want to move — are you going to use it again?

MR. MOLCHAN: We're going to use it again. Can we put it right here?

THE COURT: Put it over there. That seems to be easier. There you go.

MR. MOLCHAN: No other questions, Judge, of the witness.

THE COURT: Mr. Doss?

MR. DOSS: Thank you, Judge.

MR. MOLCHAN: I'll just put this away.

THE COURT: That's fine.

CROSS-EXAMINATION

BY MR. DOSS:

Q. Good morning, Ms. Crenshaw.

A. Good morning.

Q. Now, this drive-through window, you said it was open?

A. Yes.

Q. Open as being unlocked or open as being pushed open?

A. Open as being unlocked.

Q. Okay. Because when it was locked, it was [264] latched and had a — had a stick in it, right?

A. Right.

Q. So that nobody could come in from the outside?

A. Right.

Q. Okay. And that was supposed to be locked during closing?

A. Yes.

Q. From the inside, right?

A. Right.

Q. Okay. Now, Mr. Hurst was pretty — a pretty big heavy guy at the time, right?

A. Right.

Q. More so — even bigger than he is now, right?

A. Right.

Q. He couldn't crawl through that thing, could he?

A. No.

Q. A skinny guy, a real skinny guy might could?

A. Yes.

Q. Because it's a pretty small window, right?

A. Right.

Q. Okay.

MR. DOSS: I don't have any other questions, Judge, that's it.

MR. MOLCHAN: No other questions, Judge.

[265] THE COURT: Is she free to go?

MR. MOLCHAN: Yes, ma'am. Yes, ma'am, she is.

THE COURT: All right. Mr. Doss, no problems with her leaving.

MR. DOSS: No problems, Judge. She's released.

THE COURT: Thank you very much.

Counsel, I just want to see you administratively for a moment.

(Bench conference off the record)

THE COURT: All right. Folks, we got started just shortly after 9:30, so I'm going to give y'all a mid-morning break and then we'll come back and we'll probably go for about another hour before lunch.

So plan lunch somewhere between 12:15 and 12:30.

SECURITY OFFICER: Yes, Your Honor.

THE COURT: And, of course, I will tell you trials sometimes take on a life of their own. So it's difficult for me to be concrete, if you folks will just be flexible with me. But right now you can leave your pads either on the floor, on your arm chair, or on the rail in front of the front row. Whatever folks you want to do, that's fine. Go down. If I have any smokers, let them smoke. Let them stretch their legs. **[266]** And we come back in about 15 minutes —

SECURITY OFFICER: Yes, Your Honor.

THE COURT: — something like that, then we'll get started again.

(Jury out)

(Recess)

THE COURT: And there is a transcript up here, why?

MR. MOLCHAN: Because this is Mr. — Deputy Freeman who had the medical procedure today, Judge and we'll read that in. And I believe Mr. Doss had — I had a couple of exhibits he wanted to talk to you about with respect to Mr. — Deputy Freeman's testimony.

THE COURT: All right.

MR. MOLCHAN: If we can go ahead and approach because she needs to look at it. Specifically State's Exhibit 24.

MR. DOSS: Judge, basically in 23 and 24.

MR. MOLCHAN: Or 22.

MR. DOSS: No, that's not it. It was a different one.

THE COURT: I have 24.

MR. DOSS: The other one, Judge is 23, for the record. Your Honor, I'm objecting to those on — on a relevance basis.

[267] THE COURT: Speak up for her.

MR. DOSS: On relevance as well as it is more prejudicial than probative. There are plenty of other photos there that could show what needs to be shown. I think that shows, goes over the line as far as the gruesome nature of the photos as related back to the relevance that they were — that they would pose as to this case.

MR. MOLCHAN: They go to illustrate two things with respect to heinous, atrocious and cruel, Judge. State's Exhibit 24 indicates how she was bound over her mouth and how she was found in that position. State's Exhibit 23 shows how she was bound — her

arms were bound. Certainly that's relevant to establish the heinous, atrocious and cruel aggravator.

MR. DOSS: Judge, I think some other photos establish that she was bound. We're not contesting that she was bound and would stipulate that she was bound. These are so graphic, I don't — I don't see how it doesn't — how it passes the 403 test as far as being more prejudicial than probative.

MR. MOLCHAN: It's probative to show the heinous, atrocious and cruel nature of the killing, Judge.

THE COURT: And I understand that's your [268] argument but Mr. Doss has raised that there are other photos that he believes would establish the same information. So I'm —

MR. MOLCHAN: I mean I don't think they're — I don't have any photos that aren't as gruesome as that, Judge. They're all basically the same. These were admitted during the guilt phase of this case.

THE COURT: And I'm aware of that. No, I'm going to allow them. Anything?

MR. MOLCHAN: Judge, do you want me to go ahead and have my assistant position herself for the Freeman reading?

THE COURT: I'm sorry?

MR. MOLCHAN: For reading Deputy Freeman.

THE COURT: No, that's okay. I'll have to explain to the jury. Mr. Van Brussel, are you here just as an observer or do you need to do something in anticipation of tomorrow?

MR. VAN BRUSSEL: Judge, I was just going to ask if we could come in tomorrow at lunch and run a

test. We've had a successful test and I was going to ask you if that would be all right.

THE COURT: Absolutely. We are at your mercy.

MR. VAN BRUSSEL: Yes, sir — yes, ma'am. We had a very good test just a few minutes ago so we're [269] ready to go but we'd like to test it for tomorrow.

THE COURT: That's fine.

This is off the record.

(Discussion off the record)

THE COURT: Thank you. All right. Bring in the jury.

SECURITY OFFICER: Yes, Judge.

(Jury present)

SECURITY OFFICER: The jury's in the box, Your Honor.

THE COURT: Let the record so reflect. Everyone, please be seated.

Mr. Molchan, call your next witness.

MR. MOLCHAN: Deputy James Freeman, who will be read by my assistant.

THE COURT: All right. Come on up, ma'am. All right, folks. You are going to be presented with deposition testimony. It was given under oath and you are to give it the same weight as if Deputy Freeman were here testifying in person. Okay.

WHEREUPON, JAMES FREEMAN,
having been first duly sworn, was examined and his testimony read as follows:

DIRECT EXAMINATION

BY MR. MOLCHAN:

[270] Q. Would you state your name, sir, and spell your last name, please?

A. My name is Deputy James Freeman, F-R-E-E-M-A-N.

Q. And what is your occupation?

A. I'm a deputy with the Escambia County Sheriff's Department.

Q. Were you on duty on the morning of May the 2nd, 1998?

A. Yes, I was.

Q. And what were your duties that morning?

A. I was on routine patrol to answer calls for service and to watch for law violations, traffic, things like that.

Q. Were you dispatched to a Popeye's restaurant on Nine Mile Road?

A. I wasn't dispatched but an alert tone went out and I responded to that area.

Q. Okay. What's an alert tone?

A. It's a high pitched tone that comes out over the radio to let us know of a high priority call.

Q. Is that something that the dispatcher puts out over the radio?

A. Yes, it is.

Q. Okay. And so you were given the address?

[271] A. Yes, I was.

Q. Were you the first officer on the scene?

A. I was one of the first officers there.

Q. What time did you arrive?

A. If I can look at my notes, it's been a while.

Q. Sure.

A. I arrived at about 10:46 in the morning.

Q. What did you find when you got there?

A. When I first got there, I met with a — one of the assistant managers who had told me that she had found possibly a victim, which was Cynthia Harrison, possibly in the freezer and that she could be dead. And so I waited for a couple of more units before I went inside.

Q. Now, is that Popeye's restaurant that you're talking about located here in Escambia County, Florida?

A. Yes, it is.

Q. What did you find when you went inside?

A. When we first went inside we went around the counter, we saw a lot of blood behind the counter back near the freezer-refrigerator area. We walked into where the freezer was at and I saw what appeared to be a white female who was up on top of some containers or some chicken or something back in the freezer.

Q. And did this person appear to be dead?

A. Yes, she did.

[272] Q. Now let me show you State's Exhibit No. 22 for identification purposes. Do you recognize what is shown in this photograph?

MR. MOLCHAN: If can I approach.

THE COURT: That's fine.

THE WITNESS: Yes, I do.

Q. (By Mr. Molchan) Is that the victim?

A. Yes, it is.

Q. Is that the way she looked when you found her?

A. Yes.

Q. Let me show you State's Exhibit No. 24. Do you recognize this one?

A. Yes, I do.

Q. Is that the victim?

A. Yes, it is.

Q. Is that the way she appeared when you found her?

A. Yes.

MR. MOLCHAN: At this time the State would offer Exhibits 24 and 22 into evidence.

MR. DOSS: Your Honor, I would renew the objection.

THE COURT: So received.

MR. MOLCHAN: Okay.

Q. (By Mr. Molchan) Officer Freeman, what did you [273] do after you found the body inside the freezer?

A. After we found the body and she appeared to be dead, we backed out of the store and I put up crime scene around the area and we requested for investigations and ID officers to respond to the scene.

Q. And don't those officers respond and take over the investigation?

A. Yes, they did. I also separated the witnesses and got some written statements by them which I also turned over to investigations.

MR. MOLCHAN: Thank you, Officer. No further questions.

CROSS-EXAMINATION

BY MR. DOSS:

Q. Deputy Freeman, did you make notes of all who showed up there on the scene?

A. I did my best, yes, sir.

Q. Okay. Let me ask you some of your officers' names and see if you indicated in your notes that they were present. Was Floyd Rose or Tom Martin present?

A. Yes, I did log them.

Q. What about Sheriff Lowman?

A. Yes, I did log him.

Q. Danny Lodge?

A. Yes, I logged him.

[274] Q. Layman Reeves?

A. Yes.

Q. Steve Bates?

A. Yes.

Q. Ken Simmons?

A. Yes.

Q. Roy Jennings?

A. Yes.

Q. Jimmy Rogers?

A. Yes.

Q. Tracy Yuhasz?

A. Yes.

Q. Don Nesmith, Jr.

A. Yes.

Q. Is that Buddy Nesmith?

A. I believe so.

Q. Gordon Stukowski.

A. We call him Ski.

Q. Ski? Was he there?

A. Yes, he was.

Q. Wendell Hall? Al Taylor?

A. Yes.

Q. Did you log anybody else that we haven't mentioned here?

A. Not that I can recall.

[275] Q. Did you in your report or in your notes anywhere make a list of the number of the names of the witnesses that you participated in giving statements or getting statements from?

A. No, sir, I didn't because they gave me written statements. I just took them. Investigations showed up and I just handed them the statements.

Q. Do you know which investigator you gave those notes to?

A. I don't recall.

Q. Okay. Do you know during that morning while you were on the scene if officers there actually handcuffed some black fellow?

A. I don't —

Q. Around 10:30, 10:45?

A. I don't recall that.

Q. No?

A. No.

Q. Don't have a report of that?

A. No, sir, I don't.

Q. How long did you stay at the scene that day?

A. I stayed there most of the day. After several officers showed up along with the investigations my sergeant, which was Sergeant Bates, wanted me to call in what I had as soon as possible. I went to the precinct and [276] called it in. I came back and I was there most of the day.

Q. Now, who is Officer Simmons? Which one is that?

A. Officer Simmons, that's Ken Simmons. He was a K-9 officer that was on our shift.

Q. Okay. And did you utilize his services while you were there?

A. I believe he helped a little bit of, as far as maybe getting witness statements and helping secure the crime scene.

Q. Was this a pretty bloody crime scene?

A. Inside the store, yes, sir.

Q. Did you actually participate in the seizing of any evidence yourself?

A. No, sir.

Q. Other than those statements?

A. No, sir. That's it.

MR. DOSS: Okay. That's all I have.

MR. MOLCHAN: No further questions.

THE COURT: You may step down.

MR. MOLCHAN: I'd call Dr. Berkland. Judge, if I could pick up those pictures that have already — the 22 and 24.

SECURITY OFFICER: Stand by that chair, face madam clerk. Raise your right hand and be sworn, [277] please.

(Witness sworn)

THE COURT: Go ahead and take a seat, sir.

WHEREUPON, MICHAEL E. BERKLAND, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MOLCHAN:

Q. Could you state your name, sir?

A. Dr. Michael E. Berkland.

Q. And basically how are you — what is your profession currently?

A. Forensic pathologist.

Q. Now, drawing your attention back to May of 1998, how were you so employed?

A. Deputy medical examiner for District One, Florida.

Q. Now, at that time frame, did you go to scenes of homicides?

A. Yes, I did.

Q. And why did you do so? Why was it your practice to do so?

A. My previous training was, you know, to get the best look at the actual crime scene in terms of basically — I teach that my autopsy starts with analysis of the crime [278] scene and so in order to get that best material rather than wait for somebody else to tell me what they saw or what they did or didn't find, I would go myself and observe for myself.

Q. Now, when you would go to such scenes, would you be the person who actually collected the evidence or were there other people?

A. In some case I would. I'm the only board certified forensic pathologist that also was certified as a senior crime scene analyst by the International Association For Identification.

Q. Now, drawing your attention to May 2nd of 1998, did you go to the scene of a homicide at Popeye's on the — in the north end of Escambia County?

[279] A. Yes, I did.

Q. Now, were you working with anybody at that point in time in the crime scene kind of realm at that scene?

A. Yes, I was — actually I was already over here in this area performing an autopsy on another case when the case occurred and so I responded out to that scene with one of my assistants and we were waiting for a member from FDLE to come to analyze the blood spatter.

Q. Now, at this particular point, did you actually go inside the Popeye's?

A. Yes, I did.

Q. Was there — in conjunction with your duties in working as the medical examiner, who else are you working with?

A. Well, local law enforcement that was already there on the scene, the Escambia County Sheriff's Office deputies and detectives and then Jan Johnson from Florida Department of Law Enforcement showed up to help with the blood spatter component and do some of the collection of the materials that we identified.

MR. MOLCHAN: Now, if I could approach the witness, Your Honor.

THE COURT: You may.

MR. MOLCHAN: If could I approach the witness at this time.

Q. (By Mr. Molchan) I'm showing you State's Exhibit 31 and ask, do you recognize that document, sir?

A. Yes, I do.

Q. And what is State's Exhibit 31?

A. This is a simple CAD program, diagram of the floor layout of Popeye's Chicken at Nine Mile Road.

Q. And who was that done by?

A. Jan Johnson.

Q. Is that — does that — is it 31, I believe?

A. Yes, State's Exhibit 31.

[280] Q. Does that truly and accurately represent the store location?

A. Yes, it does.

MR. MOLCHAN: I've showed Mr. Doss State's Exhibit 58. And if could I approach the witness, Your Honor.

THE COURT: You may.

Q. (By Mr. Molchan) Showing you what's previously marked as State's Exhibit 58, sir. Do you recognize that? Is that basically the same document just in a larger size?

A. Yes.

Q. Okay.

MR. MOLCHAN: Now, Your Honor, could I ask the witness if he could step down?

THE COURT: Sure.

MR. MOLCHAN: If we could go through State's Exhibit 58, Doctor.

THE COURT: Again, Mr. Doss, please feel free to move about the room.

Q. (By Mr. Molchan) Now, this being an expanded version of 31 and — marked as State's Exhibit 58, could you kind of orient the folks on the jury to the location? Even though they're marked, if you could kind of orient them to what's going on.

A. The actual front of the store, the Nine Mile [281] Road part will be up here coming across. This is actually the front of the store. Entrances and stuff over here.

Back — this is the counter right here. There's a safe right here that was open. And then you'd come back around this area and there was water and stuff down around in this area. This is a refrigerator compartment here with a secondary freezer compartment that you can only access in through the refrigerator compartment.

This is the emergency alarmed back door with a baker's rack and then there's a mop area here and some tables and stuff like that.

Q. Now you had indicated there was water. Where did you find this water, sir?

A. There was water out in this floor area here and inside the refrigerator area and a little bit over into this prep area.

Q. Now, as far as this refrigerator area, there's some indications. Were there doors at those — and I'll use the term refrigerator doors for lack of a better way to really kind of describe it.

A. Yes, it's a large walk-in storage refrigerator that had shelves on one side — actually on this side — and then all sorts of stacked plastic bins where they would intubate the chicken with various flavors and all of the supplies and stuff.

[282] Q. And then where was the victim's body located?

A. The victim's body was back in the freezer component, which also had a door that shut it so it could

stay a much cooler temperature than the refrigerator.

Q. Okay. She was found in that location?

A. Yes, she was.

MR. MOLCHAN: Okay. If you can go ahead and retake — I'll kind of go out of order here a little bit.

Q. (By Mr. Molchan) Now you indicated the location where the wet area was —

MR. MOLCHAN: If I could approach the witness, Your Honor.

THE COURT: You may.

Q. (By Mr. Molchan) Showing you what's been previously marked as State's Exhibit 13. Do you recognize State's Exhibit 13?

A. Yes.

Q. Now, is State's Exhibit 13 a true and accurate representation of the flooring area?

A. Yes.

Q. And is that the — what you were talking about when you talked about the water?

A. That's some of it. It's dried a little bit over time. This was a fairly protracted period that we were [283] out there. But there was water in abundance, what you'd expect off just condensation and stuff like that.

Q. Now is that inside the refrigerator area?

A. Yes. This particular photo, State's Exhibit 13, is — actually we're in the refrigerator area and we're looking at a pipe that's running right in front of that freezer door.

Q. Okay. But that —

A. And it kind of makes an L shape.

Q. But it's inside the refrigerated area but not in — and then the freezer area is to another location?

A. Right. The freezer area is — you can just see the door threshold at the top of the picture.

Q. Now, during the course of that, did you also locate any kind of weapon or implement —

A. Yes, sir.

Q. — maybe not you, persons assigned the crime scene?

A. Actually, I'm the one.

Q. Now as far as that's concerned, was that item photographed — as far as its location was concerned — by Jan Johnson or other crime scene personnel?

A. Yes.

Q. I'm showing you what's been previously marked as State's Exhibit — first, 12. Do you recognize State's [284] Exhibit 12?

A. Yes, do I.

Q. And what does that depict, sir?

A. It's the emergency rear door exit. It's got the alarm on it and a baker's rack located to the left.

Q. Okay. And then State's Exhibit 11?

A. It's got an evidence placard up there and it is a — what would I refer to normally as a box cutter or what some people would call a utility knife.

Q. Now, was that collected into evidence?

A. Yes, it was.

MR. MOLCHAN: If I could approach, Your Honor? I'm showing Dr. Berkland State's Exhibit No. 36.

THE COURT: That's fine.

Q. (By Mr. Molchan) Do you recognize State's Exhibit 36?

A. Yes.

Q. Now, the box that it's in, do you recognize the initials and packaging of this item?

A. I do.

Q. And how is it that you recognize it, sir?

A. It's sealed with Florida Department of Law Enforcement evidence tape. It bears the date and the initials of Jan Johnson.

Q. And when items like that are collected, how — [285] besides her initials are there certain corresponding case numbers and things like that that are placed and labeled on it?

A. Yes. When it first comes in and is logged in as evidence at FDLE, it's got a tracking submittal sheet on it that's got bar codes and stuff on the side of the box here. It tells who the originator of the item is, what its submission is, what part of that it is and who it's submitted and received and the date. It's all tracked.

Q. Now, as you proceeded into the case, can you describe basically how the crime scene investigation went as far as into the scene as far as the locations? Did we move from one area to the other?

A. Sure. When I got there, the Escambia County Sheriff's Office had pretty much finished up most of the

processing. I believe they were still fingerprinting the doors for any latent fingerprints. They had already basically looked at everything inside with the exception of where the deceased was found and they had not bothered that area or touched it or anything and they were waiting for Jan Johnson of FDLE to get there.

I sort of showed up as an ancillary player, if you would, only because I was doing an autopsy here and I didn't have anybody to receive the evidence that I was using — that I was recovering on that body so I wondered where my [286] deputies were at.

And so when I found out where they were at, that's when we quit doing that one and went to Nine Mile Road, so —

Q. Okay. Now, during the course of that investigation, were photographs taken of the location where Ms. Harrison was located and also any indications of blood being left on the — on furniture or locations with, inside the refrigerator and freezer area?

A. Yes. Once Jan Johnson got there from Florida Department of Law Enforcement, we wound up — and she documented the scene as FDLE would do, shot her own set of photographs and then started to basically put up her own markers and stuff in order to identify the blood spatter patterns and stuff as well as any other contact stains and stuff.

For instance, like on the baker's rack, there was a contact smear of a red-brown stain that tested positive for blood that was identified right in front of the knife.

Q. And basically were those items photographed?

A. Yes.

Q. Okay.

MR. MOLCHAN: Your Honor, if I could approach.

THE COURT: You may.

[287] Q. (By Mr. Molchan) I'm going to show you a number of photographs so we can go through those. Showing you State's Exhibit 24, do you recognize 24?

A. Yes.

Q. State's Exhibit 22?

A. Yes.

Q. And what do those depict, sir?

A. State's Exhibit 22 is a medium range photograph showing the body of the deceased back on top of some boxes in the freezer compartment of the refrigerator, walk-in refrigerator unit. And State's Exhibit 24 is a, more of an upclose photograph showing an evidence marker in place, a ruler depicting, on the back wall showing blood spatter, and then the top half of the decedent.

Q. Okay. I'm showing you State's Exhibit 23. What is — is State's Exhibit 23 a true and accurate photograph of the victim?

A. Yes, it is.

Q. And what does that depict, sir?

A. This is once the body was recovered outside of the refrigerator freezer compartment. Due to the evidentiary nature of the clothing I deemed that we would in essence start the autopsy right there in order to recover the clothing and any trace evidence that may be on the body.

Given the nature of how much blood was there, [288] I didn't want that inside the body bag contami-

nating all the clothing that didn't have any blood on it, making it very difficult then to interpret blood spatter patterns after the fact.

So we made the decision to start it right there so we in essence prepared a table, put a sterile sheet and stuff and in essence sort of had a make-shift morgue right there where we started to recover the evidence.

But this is a back view showing that the hands are bound with electrical tape.

Q. Now, did she also have electrical tape around her facial area?

A. Yes, she did.

Q. And that was depicted in, I believe, State's Exhibit 22 — 24, excuse me.

A. Yes, it was.

Q. I'm also showing you State's Exhibit 29. Do you recognize State's Exhibit 29?

A. Yes.

Q. Okay. And what is State's Exhibit 29?

A. It's an incised wound to the left wrist.

Q. And when you mean incised, what are we talking about?

A. A wound that's made by a very sharp edged instrument.

[289] Q. Similar with — well, we'll go back over that at a later time.

Now I'm showing you what's been previously marked as State's Exhibit 35-A through M. and just ask, first of all, just can you look at State's Exhibits 35-A through M?

A. Okay.

Q. And do State's Exhibits 35-A through M truly and accurately depict the crime scene as you found it on May the 2nd of 1998?

A. Yes.

Q. And would those photographs aid and assist you later when you testify concerning the death and cause of death and manner of death of Cynthia Harrison?

A. Yes, it would.

Q. Okay. Now, at this time, just to orient the jurors, if we can publish a couple of items basically, the diagram and the location of the box cutter just for record purposes and the water. I'd like to do that, Judge, and finish out.

Your Honor, if the witness could step down, please?

THE COURT: He can.

Q. (By Mr. Molchan) Now, in conjunction with your continued testimony, I'm going to have you orient the jurors [290] using the chart in 58 and then I'm going to put up a couple of the photographs, specifically, State's Exhibit No. 13.

And let me just focus as best we can. Okay. There we go. Now, looking at State's Exhibit 13 and referring to the State exhibit, the diagram, can you kind of orient the folks to what we're looking at here?

A. Sure. If they don't mind, I'm going to actually flip this, it will be easier.

Q. Okay.

A. Right at the store towards Nine Mile back, back emergency door. Okay.

This is the walk-in refrigerator right here. This door right here that's coming out is the freezer door. On this exhibit, this pipe that's running right across there, this is the entrance to the freezer door right there. And that is actually her uniform neck tie that Popeye's Chicken personnel wear laying right there on the floor at the threshold.

Q. Now I'm showing State's Exhibit No. 12. This will probably — there we go. Now, if you could again explain the photograph, State's Exhibit 12 and where it orients?

A. State's Exhibit No. 12 is a shot standing right about where my finger's at on the chart here looking directly towards the back of the store. That's the [291] emergency exit with the baker's door to the left right here.

Q. Basically on that baker's rack was what?

A. On the baker's rack up on the shelf is a utility knife that was the State's Exhibit —

Q. 36?

A. Yes.

Q. Now, this is State's Exhibit 11. And again what's in State's Exhibit 11?

A. State's Exhibit 11 shows photo marker 15 depicting the utility knife or box cutter and this is not the best photo that shows it, but right on this shelf right there is a red-brown stain that tested positive for — presumptive positive for blood at the scene.

MR. MOLCHAN: I don't have any other questions of the witness at this time, Judge.

THE COURT: Mr. Doss, are you going to need the screen at all?

MR. DOSS: No, ma'am.

THE COURT: Okay.

MR. DOSS: When Mr. Molchan gets that back, can we approach?

THE COURT: Sure.

(At the bench:

MR. DOSS: Judge, based on conversations with Mr. Molchan, he's going to recall Dr. Berkland. I [292] would just go ahead and cross him all at once after he's recalled at the end of the case. So if we can just say he's subject to recall.

THE COURT: Oh, sure.

MR. DOSS: We'll do cross-examination then. I think that might be more efficient.

MR. MOLCHAN: That's fine.

THE COURT: Okay. All right.

(Bench conference concluded)

MR. MOLCHAN: I don't have any other questions of the witness, Judge

THE COURT: All right.

MR. DOSS: Judge, I would reserve my cross. I know Mr. Molchan's going to call him back toward the end and I would reserve my cross and just do it all at once, Judge.

MR. MOLCHAN: That's fine, Judge.

THE COURT: That's fine. All right. Dr. Berkland, if you would step down and sir, you're free for now. You are subject to recall.

THE WITNESS: Yeah.

MR. MOLCHAN: Let me ask Mr. Doss a question.

THE COURT: Sure.

(Discussion off the record between counsel)

THE COURT: Do you need the court reporter [293] again?

MR. MOLCHAN: It's really administratively, Judge, a question.

(Bench conference off the record)

MR. MOLCHAN: David Kladitis.

Judge, if I could retrieve those items.

THE COURT: That's fine.

SECURITY OFFICER: Sir, stand beside the chair, face madam clerk and raise your right hand, please.

(Witness sworn)

THE COURT: Go ahead and take a seat, sir.

WHEREUPON, DAVID KLADITIS,
having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MOLCHAN:

Q. Would you state your name, sir, and please spell your last name.

A. David Kladitis, spelled K-L-A-D-I-T-I-S.

Q. Now, Mr. Kladitis, where do you work, sir?

A. I work with Avalex.

Q. Where is that located?

A. Gulf Breeze Florida.

Q. And your profession currently?

[294] A. Inventory.

Q. Now, drawing your attention back to May of 1998, did you know a person by the name of Cynthia Harrison who worked at the Popeye's store on Nine Mile Road?

A. I had an acquaintance, yes, sir.

Q. And how is it that you came to meet her?

A. I came through one evening to get some chicken and she helped me with an issue, an order issue and I just remembered her from there.

Q. Had that — after that, had you seen her on one or more occasions afterwards?

A. I had not, no, sir.

Q. And drawing your attention to May the 2nd of 1998, do you recall being at the Barnes Feed Store on North Palafox?

A. I do.

Q. Was that — is that location north of Olive Road?

A. Yes.

Q. Okay. And what were you doing there, sir?

A. I was waiting for Barnes Feed and Seed to open.

Q. And what time did the store open?

A. The store opened at 7:30.

Q. Now, while you were waiting there, did you see [295] Cynthia Harrison?

A. I did, sir.

Q. And how is it that you saw her? What was she doing?

A. I was sitting on the tailgate of the truck and she drove by and as she got in line with me, she looked over, smiled and waved.

Q. And did you wave back?

A. I did, sir.

Q. Okay. And who was the person — is that the person Cynthia Harrison you recognized as being your acquaintance from the Popeye's?

A. Yes, sir, it is.

Q. And about what time did this occur?

A. Between 7:20, 7:25.

Q. And had the Barnes opened at that point in time?

A. No, they opened after.

Q. Now, what — did you notice any vehicles behind her?

A. I did. I did. After she waved, she looked in the rearview mirror abruptly and I looked behind the vehicle to see what she was looking at and there was a car pretty close behind her.

Q. Do you remember what kind of vehicle it was?

[296] A. It was a large sedan, four door sedan, blue, like an LTD, a Lincoln Town Car, something of that such.

Q. And how many people were in that car?

A. One.

Q. And was it a black person or a white person?

A. Black.

Q. Now, later afterwards, did you learn that Ms. Harrison had been murdered?

A. I did.

Q. And what did you do in response to that?

A. The 5 o'clock — I saw the 5 o'clock news later that evening and called the sheriff's department and they sent a sheriff out to speak to me.

Q. And at some later time did you go down and look at some automobiles?

A. I did.

Q. And how many automobiles did you look at?

A. I looked at approximately four vehicles that were in the impound lot.

Q. And did you recognize any of those vehicles as being the one that was behind Cynthia Harrison in the car?

A. Yes, sir, I picked out the vehicle that was behind her.

Q. And did you show that — or make that identification to any investigators?

[297] A. I did, sir.

Q. And so you identified it to him in his presence?

A. Yes, sir, I did.

Q. Okay. I'm going to show you State's Exhibits 4, 5, and 6.

MR. MOLCHAN: If I could approach the witness, Your Honor?

THE COURT: You may.

Q. (By Mr. Molchan) Showing you State's Exhibits 4, 5, and 6, can you look through those now? Which — did you identify any cars in that, out of that, those group of photographs or do you recall?

A. I don't recall. My recollection from then to now is a little different. There were some markings on the vehicle on the right-hand side that I had seen that identified the car to me.

Q. Okay.

A. Some mud, some rust and so forth that I don't see in these pictures.

Q. You don't see that on any of those pictures?

A. No, sir, I don't.

Q. But it is your recollection that you at some point in time did identify a vehicle to the sheriff's office.

[298] A. Yes, sir.

MR. MOLCHAN: No other questions, Your Honor.

THE COURT: Whenever you're ready, Mr. Doss.

MR. DOSS: Thank you, Judge.

CROSS-EXAMINATION

BY MR. DOSS:

Q. Good afternoon, Mr. — almost afternoon — Mr. Kladitis.

A. Yes, sir.

Q. So that morning, though, you left your house about what, 6:00 a.m.?

A. 6 o'clock, yes, sir.

Q. And you actually had your daughter with you, didn't you?

A. I did, sir.

Q. Okay. Now, that Barnes Feed Store, that was on Nine Mile Road as well?

A. It was on Old Palafox.

Q. Okay. But that's not where you went first, right?

A. Well, I went to Barnes Feed and Seed first. I got there too early. They weren't open. So I drove over to Nine Mile Road to the Whataburger, grabbed some breakfast, and there I drove over to the parking lot next to Popeye's and parked and was having breakfast with my daughter.

[299] Q. Okay. And where did you park in relation to the Popeye's there?

A. Between the Popeye's and the main store there, probably about a hundred feet away. About 5 o'clock at an angle.

Q. Because there's a big, long strip —

A. Strip mall.

Q. — mall right there, correct?

A. Correct, sir.

Q. And the Popeye's actually sits out in front of the strip mall?

A. Correct.

Q. Would that be an accurate statement?

A. Yes, sir.

Q. Okay. And so you were kind of in between those two, right?

A. Closer to the Popeye's but yes, sir.

Q. Okay. Because the Whataburger is just not very far down the road from the Popeye's, right?

A. Correct.

Q. Now, you and your daughter were — you and your daughter were how far, about a hundred feet from the Popeye's, maybe?

A. Approximately a hundred feet.

Q. And while you were eating there, did you see a [300] vehicle pull up?

A. I saw two vehicles pull up. The first vehicle was a small white sedan, two black males in it, a lot of loud music.

A couple of minutes later another vehicle pulled up, a darker blue sedan. Three black males got out. They were all speaking to each other, loud talking. A lot of loud music. And after a couple of minutes, I decided to just go back to Barnes Feed and Seed.

Q. A little too loud for you?

A. Yes, sir.

Q. And what time — what time of the morning was this?

A. It was approximately between 6:30, maybe 6:45.

Q. Okay. So this is prior to you seeing Ms. Harrison as you described to Mr. Molchan?

A. Yes, sir.

Q. It wasn't until you drove — you drove down to Barnes Feed Store that you ended up seeing her, right?

A. That's correct, sir.

Q. Now, these — these young black men that pulled up in the cars, they were between you and the Popeye's?

A. Correct, sir.

MR. MOLCHAN: Judge, I'm going to object to [301] the relevance of the questioning. It's been asked and answered.

THE COURT: Overruled. Go ahead.

Q. (By Mr. Doss) Were you ever able to identify anyone in that blue sedan that you had spoke to — to Mr. Molchan earlier about?

A. No, sir, I did not.

Q. And were you ever able to identify any of those young black men that you saw there at the Popeye's?

A. No, sir.

MR. DOSS: No further questions, Judge. Thank you.

MR. MOLCHAN: Just a second, Your Honor.

THE COURT: Sure.

MR. MOLCHAN: Cynthia Knight.

THE COURT: Sir, are you —

MR. MOLCHAN: I'm sorry, Judge.

THE COURT: That's okay.

MR. MOLCHAN: I don't have any more questions. I was just moving — I was on automatic pilot. I don't have any other questions.

THE COURT: That's okay. May he be excused?

MR. MOLCHAN: Yes, he can.

THE COURT: Thank you. Mr. Doss, no objection?

[302] MR. DOSS: No objection, Judge.

THE COURT: Thank you, sir. You're free to go.

MR. MOLCHAN: I do have another witness based upon your early — Cynthia Knight.

THE COURT: That's fine.

MR. MOLCHAN: I'm just moving ahead too fast, Your Honor.

SECURITY OFFICER: Step up by that chair, face madam clerk raise your right hand and be sworn, please.

WHEREUPON, CYNTHIA KNIGHT,
having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MOLCHAN:

Q. Could you state your name, please?

A. Cynthia Knight.

Q. And drawing your — where do you work presently?

A. Firehouse Subs on Nine Mile Road.

Q. And what's your job there?

A. I'm the manager.

Q. Now, drawing your attention back to May the 2nd of 1998, where were you employed?

A. Popeye's Chicken on Nine Mile Road.

[303] Q. And did you know a person by the name of Cynthia Harrison?

A. Yes, sir.

Q. And did you work with her?

A. Yes, sir.

Q. Now, you were the manager. What was her position?

A. She was the assistant.

Q. And the person by the name of Tonya Crenshaw, did you know her?

A. Yes, sir. She was also an assistant.

Q. Now, did you know the defendant Timothy Hurst?

A. Yes, sir.

Q. And did he work there at the Popeye's?

A. Yes, sir.

Q. Now, prior to May the 2nd of 1998, how long had you been working at that Popeye's?

A. About five to six months.

Q. And during this time, how often would you say you worked with the defendant, Mr. Hurst? On a weekly basis?

A. About five days a week.

Q. And do you recall what type of shoes he wore to work?

A. Tennis shoes.

[304] Q. What type?

A. White tennis shoes.

MR. MOLCHAN: If I can approach the witness, Your Honor.

THE COURT: You may.

MR. MOLCHAN: This is 37. I'm showing you what's been previously marked as State's Exhibit 37.

Q. (By Mr. Molchan) Do you recognize those shoes, ma'am?

A. Yes, sir.

Q. And who is the person who would be wearing those shoes?

A. Timothy Hurst.

Q. Now, on May the 2nd of 1998, was Mr. Hurst scheduled to work?

A. Yes, sir.

Q. And what time was he supposed to come in?

A. 8:00 a.m.

Q. What was his job at the Popeye's?

A. He was a crew member. Washed dishes, biscuits, red beans and rice, did our prep for us.

Q. Now, when you talk about the prep work, did that occur earlier, I guess at 8 o'clock?

A. Yes, sir. Before hours so we could be open for business at 10:30. So from 8:00 to 10:30.

[305] Q. Now, was anybody else scheduled to be there at 8 o'clock besides Mr. Hurst and Cynthia Harrison?

A. No, sir.

Q. And had you talked to Ms. Harrison concerning this? About working —

A. Working for me? I was supposed to work that morning and the night before I asked her to work.

Q. Now, also in this store, was there a safe inside that store?

A. Yes, sir.

Q. And who had the combination?

A. The management team.

Q. And when you mean management team, who are we talking about?

A. Myself, Cynthia, and Tonya.

Q. Now, would Mr. Hurst have the combination to the safe?

A. No, sir.

Q. Now, how would, say, the assistant manager, Ms. Harrison, Ms. Crenshaw, how would they come — they would come inside the store when it was locked?

A. You enter the front door and unlock the door, turn off the alarm and then proceed to do your morning routine, which would be count the safe, you know, de-

cide what we needed to prep that morning and that kind of stuff.

[306] Q. Okay. Now, as far as the routine for the person opening, what would be the routine for the person the night before as far as the money was concerned?

A. When they closed the night before, the deposit that they did from the night before, they would leave it in the safe and the next day, the morning manager upon coming in and verifying the money, they would take it to the bank.

Q. Now, and how would they put the — what would the money be placed inside of?

A. A plastic bag that once you sealed it, it couldn't be unsealed.

Q. And just so I'm clear, there would be a deposit and what would happen to that deposit in that morning timeframe?

A. We would take it out of the safe, drive to the bank and give to the bank teller and they would verify it and give us a deposit slip.

Q. Okay. And in addition to the deposit — well, who would make out the deposit slip?

A. Whoever made that deposit, the nighttime manager from that shift that night or the daytime manager if it was after the daytime shift.

Q. Now, would they put the deposit in a specific type of packaging?

A. Yes, sir, a deposit bag.

[307] Q. And what would that be, what kind of deposit bag was it?

A. It should have been a plastic deposit bag.

Q. Okay. Now, in addition to the deposit money, was there also money that was kept separately in the safe?

A. Yes.

Q. And what was — what was — what other monies were kept in the safe?

A. We kept money to be able to make change for the drawers. It was $375.

Q. And that was kept as a regular routine?

A. Yes, sir.

Q. Okay. And how was this money kept inside the safe? Was it contained in any type of specific container?

A. A plastic container.

Q. And that was separate?

A. Yes, sir.

MR. MOLCHAN: If I can approach, Your Honor.

THE COURT: Yes, sir.

Q. (By Mr. Molchan) I'm showing you what's been previously marked as State's Exhibit No. 2; do you recognize what's contained in State's Exhibit No. 2?

A. Yes, sir.

Q. What is contained within State's Exhibit No. 2?

[308] A. Money from the safe.

Q. Is this the change component?

A. Yes, sir.

Q. Do you recognize the container —

A. Yes, sir.

Q. — that's depicted there?

A. Yes, sir.

Q. Was that the container that was used by your store?

A. Yes, sir.

Q. To carry the — to hold the change?

A. Yes, sir.

Q. Now, the deposit slips that came into play, who — the manager would be dealing with the deposit slips; would they not?

A. Yes, sir.

Q. Okay. Now, as far as box cutters or any type of implements, did you utilize those within the premises?

A. Yes, sir.

Q. What types did you utilize in May of 1998?

A. The store on Nine Mile Road, we used the Big Lots that was right directly behind us, their box cutters because they were just cheap and easy to get to. So they were two for 99 cents.

Q. And were they a specific color?

[309] A. Yeah, either yellow, pink, green, fluorescent colors.

MR. MOLCHAN: If I could approach, Your Honor.

THE COURT: You may.

Q. (By Mr. Molchan) Showing you what's been previously marked — previously discussed and marked

as State's Exhibit 36. Is this the type of box cutter we're talking about that you used in the store?

A. No, sir.

Q. That was not used?

A. No, sir.

Q. Now, was there black electrical tape that was kept in the store as far as your knowledge is concerned?

A. Not that I'm aware of, no.

Q. Now, on that Saturday, you said that basically it would open up — your store would open up about 10:30?

A. Yes, sir.

Q. Now, did you go to the store after Cynthia Harrison' body was found and recovered?

A. Yes, sir.

Q. Now, there was a drive-in window. Could you describe that to the folks on the jury, please?

A. It's very small. It has two — if you press against it with your stomach, it opens because it has a push bar. And you had to bend down. You could barely fit [310] through. It's just little — I mean, you could barely get the stuff in and out through the window.

Q. Do you think a person can fit through there?

A. No. I wouldn't be able to.

MR. MOLCHAN: If I could approach with a couple of more exhibits.

THE COURT: Of course.

Q. (By Mr. Molchan) I'm showing you what's been previously marked as State's Exhibits 20 and 18.

I'll show you No. 18. Do you recognize 18?

A. Yes, sir.

Q. And what is 18?

A. Deposit bag that we used.

Q. And is that the kind that you guys used?

A. Yes, sir.

Q. And also State's Exhibit No. 20. Do you recognize that?

A. Yes, sir.

Q. And what is that?

A. A deposit slip.

Q. Okay. And how do you recognize that? The deposit slip located and depicted on State's Exhibit 20?

A. It's got the date on it, Cynthia, and the amount of money that was supposed to be in there.

Q. Okay. And that was for your store and [311] supposed to be deposited?

A. The next day.

Q. Based upon the routine that you're aware of?

A. Right. Correct.

MR. MOLCHAN: Judge, if I could just check a couple of things real quick.

May I approach, Judge?

THE COURT: Sure.

MR. MOLCHAN: Could I approach, Your Honor?

THE COURT: Sure.

Q. (By Mr. Molchan) I'm showing you what's been previously marked as State's Exhibit 15, which is a photograph.

Do you recognize what's contained on State's Exhibit 15?

A. Yes, sir.

Q. What is that?

A. Cynthia's driver's license.

Q. Okay.

MR. MOLCHAN: No other questions, Your Honor.

THE COURT: Mr. Doss.

MR. DOSS: If I could just have one second, Judge.

CROSS-EXAMINATION

BY MR. DOSS:

[312] Q. Good morning, Ms. Knight.

A. Good morning.

Q. State's 36 that you had been shown by Mr. Molchan; you'd never seen that before, right?

A. Which one was it?

Q. The box cutter that he showed you, State's Exhibit 36 that he just showed you?

A. Oh, at the store I had never seen it before, no, sir.

Q. Okay. You had never seen Mr. Hurst with a box cutter like that, right?

A. No, sir.

Q. And the deposit slips, they were actually kept on a shelf with other paperwork, right?

A. Correct.

Q. And as far as working with Mr. Hurst, Mr. Hurst called in a lot, didn't he?

A. He called in sometimes.

Q. As a matter of fact, he worked only four out of the eleven Saturdays that he was scheduled back in 1998, right?

A. Yes, sir.

MR. DOSS: No other questions, Judge.

MR. MOLCHAN: No other questions, Judge.

THE COURT: May she be excused?

[313] MR. MOLCHAN: Yes, Your Honor.

THE COURT: Mr. Doss, may she be excused?

MR. DOSS: Oh, yes, Judge, I'm sorry.

THE COURT: That's okay.

Thank you, ma'am.

THE WITNESS: Thank you.

THE COURT: Has lunch arrived?

SECURITY OFFICER: Not yet, Your Honor. Should be here any moment, though. I told him 12:15.

THE COURT: All right. I am going to go ahead and excuse you folks to have your lunch. It is my understanding it has not arrived but it should arrive any minute. I asked for it to be here between 12:15 and 12:30, so it should be here shortly.

I'm also going to leave you in the trusted hands of security. So if either before or after you folks want to go down and take a break and walk around, that's fine, too.

Just leave all of your notepads and enjoy your lunch.

(Jury out)

MR. MOLCHAN: What time do you want us back Judge?

THE COURT: Well, that's what I was going to ask. Are we on time, behind time, ahead of time?

[314] MR. MOLCHAN: I still think we're — I mean, I think it's going to be a long afternoon but I still think we'll be done by 5:00.

THE COURT: Because I can do one of two things. I can bring us back at 1:15 and give us a 55 minute lunch or I can bring us back at 1:30 and give you an hour and ten minutes. It makes no difference to me.

MR. MOLCHAN: 1:30 will be fine. If we can get started right at 1:30 we can —

THE COURT: 1:30 it is.

(Recess)

THE COURT: And before we address yours, let me address something, too, as well because we were in front of the jury and I really didn't get an opportunity to flesh it out much.

But when we had the original objections to the two photographs, I think it was 22 and 24, I guess it threw me a little bit only because they were previously admitted in the guilt phase of the first trial. I know that went up on appeal and it was affirmed. So I don't know

the law on this. I don't know whether because they were in the first phase and they've been affirmed on appeal, whether they're in and they can be used or whether you have the right because this is a new [315] proceeding to object. I don't know the law on that.

But I'm going to address it as if you did have the right to object because it's a new proceeding. And when I allowed Mr. Molchan to use them, I balanced, I weighed and based upon his argument about the binding, that he believed that there were no other pictures that were any less gruesome that showed the information he needed to establish HAC, then I let him use it.

When you renewed your objection in the middle of the reading of the deposition, you obviously needed to do that. It threw me a bit because I wasn't expecting that so I went a little off record. But your renewal is so noted but, of course, I'm going to overrule and I did indeed allow him to continue to use it.

MR. DOSS: And I expected that, Judge, I just didn't want, if it ever goes up on appeal again, I didn't want it to be deemed waived by me not doing it.

I fully expected to still be overruled.

THE COURT: And that's fine. And I — that's fine. Everything is on course. All right. Mr. Molchan.

MR. MOLCHAN: Judge, Dr. Berkland — I provided Mr. Doss with a number of issues that I viewed as Brady material indicating a suspension of his [316] medical license in Missouri, a subsequent issue with respect to his Florida — and I'll use the term discipline because I'm really — those two separate incidents have occurred.

And he is going — the next time that he gets on the stand, he's going to be testifying as an expert. Now, despite the fact that I gave that under the Brady obligations, it's my position that under the Supreme Court of Florida's decision in Farinas vs. State at 569 So. 2d, 425, that — which basically held and indicated that evidence of particular acts of misconduct cannot be introduced to impeach credibility of a witness. And they specifically talked about a doctor who was a key defense witness and in essence did not allow it.

There are also subsequent — because I believe this is misconduct, specific acts of misconduct that certainly led to his suspension in that situation, and that would be not allowed under the Farinas case. I cited, there's also Manhardt versus Tamton, which is 832 So. 2d 129, which is a civil case, which talked about, disallowed the questioning of a medical expert having been sued in malpractice cases. They disallowed that practice citing Farinas in that situation. Then also Liberty Mutual versus Wolfson at 773 So. 2d 1272, which talked about not allowing a witness to be [317] questioned — let me make sure I'm on the right track on that one — cross-examined regarding his suspension from the peer review process.

So in essence, kind of a suspension — you could view it as an act of misconduct.

THE COURT: Let me see if I can get to the meat since we're on our lunch break. Because having reviewed case law, I believe, before on this issue, because I know we had a police officer one time that caused difficulties in some of our Escambia County cases. Isn't the tenor of the case law that you cannot use this because they are specific acts of misconduct unless it is identical to what he's doing?

Like, for example, if it was reviewing records and he had altered records, if it was something that was on the point of the suspension was something that is relevant to this case?

MR. MOLCHAN: That's my understanding. It's an unpublished opinion in Frank's Special vs. Box which talked about, it's a civil case where the question of medical malpractice had to do with amniotic fluid emboluses diagnosis. That was the issue in question. And the expert was questioned regarding those diagnoses that he had done. He was an expert testifying about that. And then they talked — they talked about his [318] specific errors on that and they allowed that because, again, it's a specific issue in fact in that situation. So yes that's consistent. Your recollection is consistent with what I view the case law would be.

THE COURT: Mr. Doss?

MR. DOSS: Judge, I don't think that the civil cases bear upon what we have here because of Mr. Hurst's constitutional right of confrontation that rises above what we have in a general civil case. I think that's evidenced by the Crawford case that I'm sure the Court's heard cited many different times.

But I think it goes beyond that and it goes to Davis versus Alaska is the case that comes to my mind where if you have something that is going on at the same time as what was this original trial where he was — my understanding of the way it worked out is he was under investigation so to speak. That's a strong word. He was under disciplinary review. Whatever the phraseology is for —

THE COURT: That's fine.

MR. DOSS: — medical examiners. He was under review, much like whenever in Davis versus Alaska the individual was on probation and if there's something there that could possibly cause that person to alter their testimony or have a bias towards the State in an [319] effort to curry favor with them in that regard, I think that it is admissible. I think it's admissible just based upon a constitutional basis as well.

THE COURT: Mr. Molchan, again.

MR. MOLCHAN: Well, the only thing I would cite finally is Ehrhardt's attacking the credibility of an expert witness. And this is in the West Florida Practice, One Florida Practice Evidence 702.5 of 2011.

He states that Florida courts have been restrictive in permitting cross-examination concerning specific acts of the expert which arguably would be relevant to determining the attack — the weight to be given the witness's qualification as an expert. Frequently the courts focus on whether the general rules relating to attacking the general credibility of a witness permit the inquiry rather than whether they are relevant to the relative expertise of the witness.

So basically Ehrhardt is citing a number of different cases.

THE COURT: Are they criminal cases?

MR. MOLCHAN: Yes, there are criminal cases that are involved in that, too. In Farinas, Farinas is a criminal case.

THE COURT: Okay. I have, again, like I said, I've had this issue come up and I did believe that it [320] applied to civil — I mean to criminal as well as civil. I understand that Mr. Molchan cited some civil case. At

least at this juncture, I'm going to deny it but I will over lunch look at the Davis case.

MR. DOSS: Okay.

THE COURT: It's Davis versus Alaska?

MR. DOSS: Yes, I think it's a U.S. Supreme Court case 1976 I want to say. I don't remember the cite but I think it's —

THE COURT: Well, I think the Davis vs. Alaska will be easy to pull up.

MR. MOLCHAN: Probably not going — not a lot of Alaska cases, right?

THE COURT: Yes. Thank you.

(Recess)

THE COURT: All right. Mr. Doss, unfortunately, I am not as familiar as you are with a lot of the landmark death penalty cases. I know probably most of them but I was not familiar with the Davis case. The cite is 415 U.S. 308, 94 Supreme Court, 1105 and it's a 1974 case.

My ruling is going to stand.

I think there's some issues in that case that can be distinguished from the present case. I know that one, the trial court based its ruling on a state [321] policy protecting a juvenile offender's anonymity.

In this case I'm doing it on evidentiary principles. So I think that's a little bit different. In addition, in that case, it was — the area that they wanted to cross-examine wasn't really a specific act of misconduct as much as it was the Supreme Court felt that basically, it might have shown some bias towards the State — or in favor of the State because the offender — or the juve-

nile offender at that time was on a probationary status and I think that's another thing that we have distinguished here. So my ruling is going to stand.

All right. Anything we need to do before we bring in the jury?

MR. MOLCHAN: Not from my side, Your Honor.

THE COURT: Bring in the jury.

SECURITY OFFICER: Yes, Your Honor.

(Jury present)

SECURITY OFFICER: The jury's in the box, Your Honor.

THE COURT: Let the record so reflect. Everyone, please be seated. Mr. Molchan, call your

next witness.

MR. MOLCHAN: Buddy Nesmith.

SECURITY OFFICER: Sir, if you'll stand by the [322] chair, please. Face madam clerk. Raise your right hand and be sworn.

(Witness sworn)

MR. MOLCHAN: If I can proceed Your Honor.

THE COURT: You may.

WHEREUPON, DONALD BUDDY NESMITH, JR., having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MOLCHAN:

Q. Could you state your name, sir?

A. Yes, sir. Donald Buddy Nesmith, Jr.

Q. If you could spell your last name.

A. N-E-S-M-I-T-H.

Q. And your profession?

A. I'm a sergeant with the Escambia County Sheriff's Office, major crimes investigations.

Q. How long have you been so assigned to that unit?

A. About seventeen years.

Q. And how long have you been in law enforcement in general?

A. Thirty.

Q. Now, drawing your attention to May 2nd of 1998, were you assigned to the major crimes division within [323] the Escambia County Sheriff's Office?

A. Yes, sir.

Q. Did you — were you called or did you go to the scene of the Popeye's restaurant on Nine Mile Road and assist in the investigation of the death of Cynthia Harrison?

A. Yes, sir.

Q. Now, during that course of your investigation did you have any contact with a person by the name of David Kladitis?

A. Kladitis, yes, sir.

Q. Kladitis? Okay.

A. Yes, sir.

Q. And in that context, did you or other officers — you as well as other officers, show him some photographs or show him some automobiles?

A. I personally showed him some automobiles.

Q. And if you could, could you describe to the folks of the jury what you did —

A. We had — we have an impound lot and we walked him out to where there were several cars parked in the — in the impound lot there at the sheriff's office to have him — see if he recognized a particular vehicle.

Q. Approximately when in relationship to — the murder was on May 2nd. When did this process occur, [324] approximately? Or how many days later?

A. I want to stay a couple of days later. I'm not real sure.

Q. And in that process, did you also — at that point in time, when you showed him these vehicles, had you picked up a vehicle belonging to Mr. Hurst?

A. Yes, we did.

Q. And what type of vehicle was it?

A. It was a blue Mercury Marquis.

Q. Okay. And in fact, when you brought Mr. Kladitis in, did he indicate which car that he had seen by the Barnes Food?

A. Yes, he picked the blue Mercury Marquis.

MR. MOLCHAN: Okay. If I could approach the witness, Your Honor?

THE COURT: You may.

Q. (By Mr. Molchan) Showing you what's previously marked as State's Exhibits 4, 5, and 6 and ask if you recognize those items.

A. Yes, sir. This is the car Mr. Hurst was driving.

Q. Okay. And which one of those — there's two cars in some of the photos, just for clarity's sake?

A. It's the — well, actually it's the Marquis. The one with the temporary tag in the back.

[325] Q. And which number that exhibit —

A. Well, it's —

Q. — on the back.

A. 6 — 5 and 6.

Q. Okay. 5 and 6?

A. Yes, sir.

Q. Now, the other one, 4 has —

A. The other one has just the front — front of the car.

Q. Front portion?

A. Yes, sir.

Q. Now, that car in the — was it in the impound lot when Mr. Kladitis —

A. Actually, when this picture was taken it was in the evidence garage.

Q. I'm talking about when Mr. Kladitis picked it out.

A. Yes, sir.

Q. And that was the car driven by Mr. Hurst?

A. Yes, sir.

MR. MOLCHAN: No other questions, Judge. I would retrieve 4, 5, and 6 at this time.

THE COURT: Mr. Doss?

MR. DOSS: I think we probably ought to handle this witness the same way we did —

[326] THE COURT: Dr. Berkland?

MR. DOSS: Yes, Your Honor.

THE COURT: All right. Is that okay with you, Mr. Molchan?

MR. MOLCHAN: That's fine, Your Honor.

THE COURT: All right. Then I am going to dismiss you now subject to recall.

THE WITNESS: Okay.

THE COURT: Thank you, sir.

THE WITNESS: All righty.

MR. MOLCHAN: Call Carl Hess.

SECURITY OFFICER: Sir, if you'll stand by that chair. Face madam clerk.

Raise your right hand and be sworn.

(Witness sworn)

THE COURT: All right, sir. You sound like you might be a little soft spoken so if you will just make sure you speak up into the microphone.

THE WITNESS: Okay.

WHEREUPON, CARL HESS,
having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MOLCHAN:

Q. Could you state your full name, sir and spell [327] your last name specifically?

A. Carl Hess, H-E-S-S.

Q. I want to draw your attention, sir, back to May 2nd of 1998. Were you employed at that time?

A. Yes, sir.

Q. And where were you employed?

A. Wendy's on Nine Mile Road.

Q. Now, is that in close proximity to the Popeye's?

A. Yes, sir.

Q. And could you describe to the members of the jury where the two — or kind of the location of both restaurants?

A. They were both on Nine Mile Road. Wendy's was on one side, there was a patch of grass, a sidewalk, and then a road and then a patch of grass and then Popeye's.

Q. And how long had you been working at that particular Wendy's?

A. About a year or less.

Q. Okay. Did you know a person by the name of Cynthia Harrison?

A. Yes.

Q. Had you met her on other occasion?

A. Yes, sir.

Q. Okay. Now, on the morning of May the 2nd, [328] 1998, what time did you arrive at your — did you go to your Wendy's?

A. Yes.

Q. About what time did you get there?

A. About 6:00 a.m.

Q. Okay. Now, what do you do when you get there as — what are your duties?

A. At that time, I was a prep, getting everything ready in the morning. There was three different shifts. Of that day, I was the morning prep. My job was to do a lot check and get the meat ready and salads and all of that.

Q. Now, during that time that you're doing that, did you stay within the restaurant the whole time?

A. In—

Q. Inside the Wendy's the whole time that you were there on that date?

A. On that day my duty was to go outside and do a lot check.

Q. What do you mean by a lot check?

A. To go outside and make sure that there was no litter around or anything like that, you know, pick it up.

Q. In other words, patrol the grounds and make sure that it's —

A. Clean.

Q. — clean? In that timeframe, when you were [329] out in the parking lot, did you see anybody arrive at that Popeye's store?

A. I saw the manager come in.

Q. And who was that?

A. Cyn — Cynthia — I can't pronounce her name. Sorry about that.

Q. And approximately what time did you see her or do you recall seeing her, approximately?

A. I want to say about 7:00 a.m.

Q. Now, were you looking at your watch when this is going on?

A. I did not have a watch on at that time.

Q. Okay. So as far as it — it's in the morning but as far as the specifics, can you really say? I mean —

A. Well, when you came in, there's, you know —

Q. A job task —

A. A job task. This is the time that you need to be doing this; this is the time you need to be doing that.

Q. So that's based upon your recollection of how long it took you to achieve the task before you went out to the parking lot?

A. To the next task, yeah.

Q. Now, when you saw her, what did she do?

A. She just went in and did her thing.

Q. Now, at any point later did you see anybody [330] else arrive?

A. About between 7:30 and 8:30, I saw somebody else come.

Q. Okay. Do you recall the type of vehicle you saw?

A. I want to say it was a light blue — some kind of blue Taurus, Ford car.

Q. Okay. And did you see anybody in that vehicle?

A. Yes, I did.

Q. What did that person do?

A. They got out. They — they parked their car. It was about three or two parking spaces from a phone booth and got out of the car and proceeded to go to the front.

Q. Now, were there anybody — was there anybody else that got — that you observed getting out of the that car?

A. No.

Q. Just one?

A. Just one.

Q. And did you get a look at that individual?

A. Yes, I did.

Q. Could you describe how he was — what he was wearing?

A. He was dressed in a Popeye's uniform, had his [331] baseball cap on backwards. At that time, he — he was talking to himself, which drew my attention and started watching him and then he started banging on the front window, which also drew my attention at that time, too.

Q. Now, when you observed — well, first of all, can you describe the basic size of this individual?

A. About 280, 300 pounds, about six foot.

Q. Okay. Now, when he was banging, what — you observed him banging. Was there anything else you observed him doing at that point in time?

A. He — like I said, he was just banging at the side of the window and she came, unlocked the doors, let him in, then they both went in at that time.

Q. And basically, had you seen this individual before?

A. Through several, you know, like, you know, three months, four months prior to that, yes.

Q. Okay. And where did you see him at?

A. At Popeye's and also at Wendy's.

Q. Now, the individual that you saw goes inside the Wendy's; there's nobody else with him at that point in time?

A. No, sir.

Q. Now, what did you do after seeing him observe him go inside the Wendy's? What did you do next?

[332] A. I went ahead and finished up my task to go to the next task at that time.

Q. Now, did you get a good look at that individual that went into the Popeye's?

A. Yes. Like I said, he was 280 pounds, 300 pounds; he was in a Popeye's uniform, black gentleman.

Q. Okay. And you indicated — the officers show you a photographic lineup of people?

A. Correct.

Q. And can you describe what they did as far as showing you this particular lineup?

A. They laid out some photos. They asked me to pick him out. I said that that's the gentleman right there, Timothy Hurst. They had asked me how did I know about that? I said that I had did a quick inter-

view with him and passed on the application to my store manager at that time.

Q. That's at the Wendy's?

A. Yes.

MR. MOLCHAN: Your Honor, if I could have this marked — let's mark this 47-B. and C. Just for clarity purposes, there's already a 47 but if could I have these two pieces of paper marked 47-A (sic) and B.

If I could approach the witness, Your Honor.

THE COURT: You may.

Q. (By Mr. Molchan) Do you recognize State's [333] Exhibits 47 and 47 — 47-B and 47-C?

A. What do you mean by recognize?

Q. Do you recognize these documents, sir?

A. Correct.

Q. How do you recognize them?

A. This is the ones that they laid out on me that day.

Q. Okay. And how did you — do you see your signature on those documents?

A. Yeah, here and also here.

Q. On — both documents are signed by you?

A. Correct.

Q. And the person you picked out was the person in —

A. Correct.

Q. — photo No. 67?

A. Six.

MR. MOLCHAN: Judge, I would move this one into evidence because this is a new — a different document.

MR. DOSS: No objection, Judge.

THE COURT: So received.

MR. MOLCHAN: I'll just check one thing,

Judge. No other questions, Judge.

THE COURT: Mr. Doss.

[334] MR. DOSS: Thank you, Judge.

CROSS-EXAMINATION

BY MR. DOSS:

Q. Now, you had just told Mr. Molchan, Mr. Hess, that you saw her let the gentleman in?

A. Correct.

Q. Do you remember saying something different at a different time on that?

A. Do I remember saying something different at that time? No, I do not.

Q. Do you remember taking a deposition in this matter?

A. Yes, sir.

Q. That was obviously a lot closer in time than it is here today, right, to the event that we're talking about?

A. I'm sorry, repeat that again.

Q. I said that's a lot closer in time to what we're talking about was when you took the deposition, right, than it is today? Your deposition was —

A. Well, you're talking about twelve years ago.

Q. Right. Right.

MR. DOSS: Can I approach, Judge?

THE COURT: Of course.

Q. (By Mr. Doss) I direct your attention to line [335] 15, if you'd read through 22 — don't read it outside, just read it to yourself, sir.

A. From 15 to 22?

Q. Yes, sir. Now, back on that day in the depo, do you remember saying that when she unlocked the door and let herself in, that's the last time you saw her?

A. Like I said, that day I saw her go in. I saw the gentleman knocking on the door and banging on the door and let him — let him in that day.

Q. But when you took your deposition, you indicated that the last time you saw her was when she unlocked the door and was going in?

A. Yes, but what I saw that day is her going to work and then letting this gentleman in.

Q. But on that day, you answered a different way than you're answering it today, correct?

A. Correct.

Q. So did your memory get better with time?

MR. MOLCHAN: Objection, argumentative testify Judge.

THE COURT: No, go ahead.

Q. (By Mr. Doss) Did your memory get better with time?

A. I'm just telling you what I saw that day.

Q. So you remember it better now than you did [336] twelve years ago?

A. Like — like I said, I'm just telling you how I saw it.

Q. Now, your basis for — well, let's back up. Isn't it true that from the Wendy's over to the Popeye's is a pretty good distance, isn't it?

A. Correct.

Q. Wouldn't you say that that's probably about 175 feet?

A. I would say so.

Q. Because you're actually looking across — across the street?

A. Across.

Q. You've got the grassy area between the sidewalk and the street, the street itself, and then over to the building, right?

A. Correct.

Q. And then you've got the parking spaces both for Wendy's and for Popeye's, right?

A. Correct.

Q. Now, I think that you had — you had stated that you — you said that was the gentleman, Timothy Hurst, when you were doing the lineup. Is that what you said?

A. Correct.

Q. Now, isn't it true that whenever — whenever [337] this happened, you never — you never stated that the man you saw was Timothy Hurst and that you knew him immediately, right?

A. No, sir, I did not.

Q. Yet here today, twelve years later you're telling us that you told them that it was Timothy Hurst?

A. No, it wasn't until two, three days later that I told them.

Q. After it had already come out in the paper?

A. When they put — no, I hadn't seen anything in the paper. It was in the lineup came out.

MR. DOSS: May I approach the witness, Judge?

THE COURT: Sure.

Q. (By Mr. Doss) Do you remember giving testimony in these proceedings previously? Do you remember giving testimony in these proceedings previously?

A. Yes.

Q. Okay. I'm going to direct your attention to — this is page 316, line 20.

If you would read 20 through 23 to yourself, please.

A. From where, now?

Q. From line 20 to line 23, please.

A. Correct.

Q. Now, would you agree with me that you answered [338] that question that I just asked you differently on that date —

A. Yes, I did.

Q. — than you did here today?

A. Yes.

Q. So what you're telling us today conflicts with what you told the Court before?

A. Yes.

Q. Did you ever see a second young black man come up to the Popeye's?

A. No, sir.

Q. Did you ever see any other vehicles pull in that parking lot that morning that had any young black men in it?

A. No, sir.

Q. So would it be fair to say that as you sit there today, you're telling us you never saw any other young black men in the parking lot prior to the delivery truck arriving?

A. No, no one showed up.

Q. And you didn't — you didn't see any cars that were sitting in the parking lot playing loud music?

A. No, sir.

Q. Now, isn't it — your ID — I believe you had told the police that your ID was based on a prior interview **[339]** of Tim Hurst for a job at Wendy's?

A. Correct.

Q. And you claimed at that time to be an assistant manager, right?

A. Correct. Also a manager in training.

Q. But at that time you weren't an assistant manager, were you?

A. No, I had just started the program.

Q. But you weren't an assistant manager like you told them?

A. No, I was a manager trainee.

Q. And you ended up — you said you were a manager trainee but you had failed out of that assistant manager program, right?

A. Correct.

Q. And you didn't have any authority to review any applications, isn't that correct?

A. At that time Son had allowed me to — which is the store manager at that time.

MR. DOSS: May I approach, Your Honor?

THE COURT: Yes.

Q. (By Mr. Doss) I'm going to show you page 311, line 14 through 16 and ask if you'd read that question and answer for me, sir — to yourself.

A. Correct.

[340] Q. Isn't it true on the day that testimony was taken, that you answered the question differently on that day than you just did?

A. I answered the same way that I just did now. I told you that I was a manager trainee at that time and Son allowed me to do stuff like that.

Q. Well, the question was the truth is you didn't have that authority to interview applicants, did you? And your answer was no on that day, right?

A. Right, just the same way I just answered.

Q. And the truth is, you never interviewed Mr. Hurst, did you, because you couldn't?

A. Yes, I did, at that time.

Q. You didn't have any authority to do any interviewing?

A. (No response).

MR. DOSS: I don't have any other questions, Judge.

MR. MOLCHAN: No other questions, Judge.

THE COURT: May he be excused?

MR. MOLCHAN: Yes, he can.

THE COURT: Mr. Doss?

MR. DOSS: Yes.

THE COURT: Thank you, sir. You're free to go.

[341] THE WITNESS: Thank you.

MR. MOLCHAN: Call Lee Smith.

SECURITY OFFICER: Step up by the chair. Face the clerk. Raise your right hand and be sworn, please.

(Witness sworn)

THE COURT: All right, sir. You sound fairly soft spoken. Make sure you speak directly into the microphone. Take a seat.

WHEREUPON, LEE SMITH,
having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MOLCHAN:

Q. Would you state your name, sir?

A. Lee Smith.

Q. And do you have kind of a nickname?

A. Lee-Lee.

Q. Lee-Lee?

A. (Nods head affirmatively).

Q. Now, how old are you right now?

A. Twenty-nine.

Q. Drawing your attention back to May the 2nd of 1998, how old were you?

A. Fifteen.

Q. Now, where were you living back there in May [342] of 1998?

A. 1272 Basin Street.

Q. And who were you living there with?

A. My mother and father.

Q. And did you know a person by the name of Timothy Hurst?

A. Yes.

Q. And is he present in the courtroom? If you can, can you point him out and describe what he's wearing?

A. Yes. Right there in the green shirt.

MR. MOLCHAN: Let the record reflect he's correctly identified the accused.

THE COURT: The record shall so reflect.

Q. (By Mr. Molchan) Would you describe him as a friend at that point in time back in May 2nd of 1998?

A. Yes, we was hanging, yes.

Q. Okay. Did y'all live in the same basic neighborhood?

A. Yes.

Q. Now, drawing your attention to the morning of May 2nd, 1998, did he come over to your house?

A. Yes.

Q. Prior to that morning, had he said anything about robbing a Popeye's?

A. Yes.

[343] Q. When did he say something to you about that?

A. Are you talking about that morning?

Q. Did he — prior to that morning, prior to May 2nd, had he told you anything about robbing the Popeye's prior to that morning when it actually happened?

A. Oh, you mean before?

Q. Yes, sir.

A. Yes.

Q. What did he tell you?

A. He just said that he was gonna rob them.

Q. About what time — when did that occur? Was it — do you recall a day when that occurred prior to the actual robbery?

A. Maybe two or three days before.

Q. Okay. Did you — what did you think about that?

A. I didn't think nothing of it.

Q. I mean, you didn't think about it at all?

A. No, not really, no.

Q. Why was that?

A. I just didn't.

Q. Didn't think — I mean, I'm just asking. You just —

A. No, sir, I didn't think too much of it.

Q. Okay. Now, did he come by your house on May [344] the 2nd, that Saturday morning?

A. Yes.

Q. About what time?

A. I don't recall. It was early morning.

Q. Okay. Now, when he got to your house, what happened when he got there?

A. He told me what he had done and he came in with some money.

Q. Now, what did he say when he came in?

A. He told me that he just robbed Popeye's.

Q. What else did he say?

A. He told me what he had done.

Q. When he said what he — what did he tell you that he had done?

A. He told me that he had cut her.

Q. Cut her?

A. Yeah.

Q. Okay. Did you see anything on his clothing?

A. Yes, I seen a little blood on his pants line.

Q. Okay. Now, what did he ask you to do with the pants?

A. He told me to wash his pants.

Q. And did you do that?

A. Yes.

Q. When you came to wash them, where did you put [345] them?

A. In the washing machine.

Q. In the washing machine?

A. (Nods head affirmatively).

Q. Did you put anything else in the washing machine as far as cleaner or anything?

A. Washing powder.

Q. Okay. How did you — and who told you to do this?

A. Timothy.

Q. Now, did you have those — did you dry those clothing — that clothing?

A. Yes.

Q. And how did you dry it?

A. Dryer.

Q. Now, what did y'all do with the money?

A. Hid it in my room.

Q. Do you recall it being kept in anything? When he brought it, how did he bring it?

A. It was in a container.

Q. Clear container?

A. Yes.

Q. And did you count some of the money?

A. Yes, I believe I did.

Q. How much was there, approximately; do you [346] recall?

A. I don't know. In all?

Q. Uh-huh.

A. It probably was a little over a thousand dollars, I would believe.

Q. Okay.

A. I think.

Q. Now, did he have anything else with him other than — you saw the container you've described. Was there anything else that he had with him?

A. He had a wallet.

Q. Okay. A wallet. Did you look inside the wallet?

A. No.

Q. Okay. Did you — what did you do with the wallet?

A. I threw it in a little garbage can in my backyard.

Q. What else did you put in the garbage can?

A. Some shoes.

Q. Whose shoes were they?

A. Timothy's.

Q. Were there socks with the shoes?

A. I don't recall.

Q. Did you throw the shoes away?

[347] A. Yes, I threw the shoes away.

Q. And whose direction — who told you to throw the shoes away?

A. Timothy.

Q. I show you State's Exhibit No. 37.

MR. MOLCHAN: If I can approach, Judge.

Q. (By Mr. Molchan) Do you recognize State's Exhibit 37? I know it's been a long time.

A. Not really.

Q. Okay. Not really?

A. I don't quite remember what they looked like.

Q. Okay. But you remember throwing a pair of shoes in the garbage can?

A. Yes.

Q. And they were Mr. — they were Mr. Hurst's shoes?

A. Yes.

Q. Now, did he — Mr. Hurst tell you anything about what he did with the person that he had cut?

A. Yes, he told me that he had put her in the freezer.

Q. Now, after — after that, after you — what did you do with the money after that?

A. I hid it in my room.

Q. You hid it all in your room?

[348] A. Yes.

Q. After you hid the money, what did y'all — what did you guys do?

A. We went to — we went to Wal-Mart.

Q. And was — who else was with you at that time?

A. I believe — I don't really recall nobody being with us.

Q. You don't recall anybody being with you at Wal-Mart?

A. No. Not really, no.

Q. Okay. Well, what happened at Wal-Mart? What did Mr. Hurst do at Wal-Mart?

A. He bought some shoes.

Q. And how much did he pay for the shoes or do you recall?

A. No.

Q. Now, when you went to the Wal-Mart, whose car did you go in?

A. We rode in his.

Q. Say again?

A. Timothy's.

Q. Timothy's?

MR. MOLCHAN: If I can approach, Your Honor.

THE COURT: Yes.

Q. (By Mr. Molchan) Showing you State's Exhibit [349] No. 6, is that —

A. Yes.

Q. That's the vehicle that you went to Wal-Mart in that belonged to Mr. Hurst?

A. Yes.

Q. Now, after you went to the Wal-Mart, what did y'all do?

A. We went across the street to the pawn shop.

Q. What happened at the pawn shop?

A. He bought three rings.

Q. When you mean he bought three rings, who is that?

A. Timothy.

Q. Now, did you go immediately and buy the rings or how did that happen that you went to the pawn shop? Do you recall —

A. No. No. I believe we went back and got some money. Then we went back to the pawn shop.

Q. And when you say you got some money, who got the money?

A. Well, I went and got it out of my bedroom.

Q. Okay. And who paid for the stuff at — was that the money from the container?

[350] A. Yes.

Q. And then you got that for Mr. Hurst?

A. Yes.

Q. And then you went to the pawn shop?

A. Yes.

Q. What happened at the pawn shop? Was — you talked about buying three rings.

A. He purchased them.

Q. Okay. And when you went over there, did you go in the same vehicle that we talked about, his car?

A. Yes.

Q. After the pawn shop, what did y'all do?

A. We went back to the neighborhood.

Q. Okay. What did Mr. Hurst do?

A. We went back to the neighborhood, yes.

Q. Now, Mr. Smith, did you go into the Popeye's on May the 2nd, 1998?

A. No.

Q. Did you go in a little window and sneak in a little window at the drive-in?

A. No.

Q. Did you kill Cynthia Harrison?

A. No.

Q. Did you have anything to do with that as far as the murder of Cynthia Harrison?

A. No. Nothing besides hiding the money.

Q. Now, let me ask this question: You heard Mr. [351] Hurst talk about robbing the Popeye's —

A. Yes.

Q. — prior to it happening. Why didn't you do anything?

A. I don't know.

Q. You don't know?

A. No.

Q. Was it something — did he ask you to come along?

A. No.

MR. MOLCHAN: No other questions, Your Honor.

THE COURT: When you're ready.

MR. DOSS: Can I approach, Judge?

THE COURT: Sure. Do you need the court reporter?

MR. DOSS: No.

THE COURT: No?

MR. DOSS: I don't think so.

THE COURT: Okay.

(Bench conference off the record)

THE COURT: All right. Folks, if I could just have you step out for just a few minutes. Just leave your notepads and I'll bring you right back in. We're just going to kind of reorganize for a minute.

(Jury out)

[352] THE COURT: Do you want him to step out?

MR. DOSS: That's fine, Judge.

THE COURT: Yes? I just didn't know if it was going to be 30 second or five minutes.

MR. DOSS: I've got to look in these boxes, Judge.

THE COURT: That's fine.

MR. DOSS: I don't know why I can't find it.

THE COURT: That's fine.

MR. DOSS: I've got all the rest of them.

THE COURT: That's fine.

Mr. Smith, it's up to you. If you want to sit there, that's fine. If you want to step out, that's fine. Whatever you want to do.

THE WITNESS: Okay.

THE COURT: Mr. Doss, do you want me to call for the deposition, a copy of the deposition that's in the court file? I can do that.

MR. DOSS: I might have to have you do that, Judge.

THE COURT: We'll — that's fine. We'll just do it in an abundance of caution. If you find yours, that's fine. If not, we'll have one up here.

MR. DOSS: Thank you, Judge.

THE COURT: Not a problem.

[353] THE CLERK: It's Nesmith, correct, Judge?

MR. MOLCHAN: Junior. There's a junior and a senior.

THE CLERK: Here it is. This is Senior. Wrong one?

MR. MOLCHAN: That's the wrong one.

THE COURT: Would it help you guys if I looked on the website?

THE CLERK: That would be great. Like a date or something.

THE COURT: Just a second.

MR. DOSS: I think it might be 8/13/99 on the date.

THE CLERK: 8/13/99?

MR. DOSS: I think so.

THE COURT: Here. Oh, it was 9/1 of '99.

THE CLERK: Thank you.

THE COURT: Is there a file that I can be looking through?

THE CLERK: We've only got these two files of depositions.

THE COURT: Could it be in an earlier file?

THE CLERK: That's what we just looked at.

(Discussion off the record between the Court and the clerk).

[354] THE COURT: It is not in here.

MR. DOSS: It's not, Judge?

THE COURT: Yeah, it's —

THE CLERK: It's got to be.

THE COURT: The 18th amended discovery exhibit and then the 19th amended discovery exhibit are here.

The very next thing should be the deposition.

THE CLERK: And it's not there. That's what we saw, too.

THE COURT: It's not there. And right after that the motion for protective order that is there. So everything is here except for the deposition.

THE CLERK: That's what we saw, so — I don't know where it would be.

THE COURT: Is there a file we can go through, perhaps?

THE CLERK: I just went through this with a fine tooth comb. All of those are 2000 and 2002.

THE COURT: Do you think that because it went up on appeal that it maybe got shuffled in that stuff?

THE CLERK: Well, there's one — I mean we can look but, you know, it's not consistent.

THE COURT: And again, Mr. Smith, if you want to step down, that's fine. If you want to just stay, that's fine as well. **[355]** It's not in this one.

THE CLERK: Yeah, there's no other files.

THE COURT: I mean, could it have got in any of the postconviction stuff? I mean, I —

THE CLERK: I looked.

MR. DOSS: That's what I was looking at, Judge, to see if they had admitted it in the postconviction and I didn't see it.

(Discussion off the record between the Court and the clerk)

MR. DOSS: Judge, was it — was it attached to your order denying the 38.50?

THE COURT: Denying what?

MR. DOSS: The 38 — the motion to vacate.

THE COURT: I don't know but I'll check it out.

MR. DOSS: Because I'm looking here in volume ten and I know it has — volumes nine and ten have a tremendous number of attachments where you had attached various things to your denial, to your order denying it.

THE COURT: I'll look and see in just a minute.

No, the order denying motion to vacate judgment of conviction and sentence, it — it appears [356] that there were only three attachments.

MR. DOSS: Judge, I see where there is —

THE COURT: One is the —

MR. DOSS: — trial testimony.

THE COURT: — evidentiary hearing. And then I believe there was a trial transcript and then there's the deposition of Willie Williams and then I think there's the deposition of Michael Williams. I think those are the only ones there.

(Discussion off the record between the Court and the clerk)

THE COURT: Mr. Molchan, do you have a copy?

MR. MOLCHAN: I looked for it. I was telling Mr. Doss I looked for it on Sunday just to double check and I could not find it. Mr. Rimmer had all the depos in a file box with everybody's and it wasn't in there. And I don't remember seeing it prior to that time. I was just checking to be double checking.

THE COURT: I can go upstairs and look because I keep a file as well. I can't imagine that I would have needed to copy of a deposition.

I mean, I guess we can take a break and call the court reporter and see if we can —

MR. DOSS: Judge, there's a — there's a possibility it's sitting in my hotel room and I just [357] didn't pick it up this morning. I can't tell you that. I don't know that. But I know I've looked at it.

THE COURT: Well, I —

MR. DOSS: Because I've got a tremendous amount of notes regarding the deposition.

THE COURT: I think we're going to have to take a break and find this, though, because I think it's important to your cross. Or at least you've indicated that it's important to your cross. So —

MR. DOSS: There's —

THE COURT: Mr. Smith, why don't you go ahead and step down because it looks like this may be a little more protracted than I thought.

THE CLERK: I have looked at the current one and I can't imagine —

THE COURT: See, and unfortunately, it was filed before it was scanned.

THE CLERK: Yeah, before we did scanning.

THE COURT: Yeah, so —

THE CLERK: If we had it scanned, it wouldn't be a problem.

THE COURT: How long will it take you to get to your hotel?

MR. DOSS: It's at Residence Inn right there. Five minutes, maybe.

[358] THE COURT: Do you want to go?

MR. DOSS: I will go try and see.

THE COURT: That's fine.

MR. DOSS: Like I said, I don't know a hundred percent one way or the another that it's there. I'll call

my investigator and see if it is something he has. I don't think he does.

THE COURT: And, Susan, if you'll double check at the same time and then maybe — if you can double check as well.

(Recess)

(Jury present)

SECURITY OFFICER: The jury's in the box, Your Honor.

THE COURT: Let the record so reflect. Everyone, please be seated. I apologize for the delay. It took us a little longer than we thought but we are now ready to proceed.

Mr. Doss, go ahead.

MR. DOSS: Thank you, Judge.

CROSS-EXAMINATION

BY MR. DOSS:

Q. Mr. Smith, you had indicated that you thought you saw some blood on Mr. Hurst's left pant leg.

You didn't see any blood on his hands, did [359] you?

A. No.

Q. You didn't see any blood on his shirt, did you?

A. No.

Q. Now today, you had indicated that you had washed those pants and put them in the dryer. Do you remember answering that question differently at a — at a different time?

A. No.

MR. DOSS: Judge, may I approach the witness?

THE COURT: Yes.

Q. (By Mr. Doss) Mr. Smith, I'm going to ask you to read from page 397 on line 23 to line 16 of 398. Okay? You don't have to read it out loud. Just read to yourself.

A. What line you said on this page?

Q. From 1 through 16 on 398.

Does that refresh your recollection as to whether or not you answered that question differently in previous testimony?

A. Yes.

Q. What did you say? What did you say then?

A. About drying them?

Q. Yeah. That it was dried with an iron because the dryer was broke; is that correct?

[360] A. No, the dryer wasn't broke.

Q. Why would he iron them dry if the dryer wasn't broke?

A. I guess they wasn't dried all the way.

Q. So on that — on that day in your prior testimony, you said that you — that you washed the pants and then Tim Hurst dried them by ironing them, correct?

A. Yes.

Q. Now, I think here today when Mr. Molchan was questioning you, you said that you counted a little bit over a thousand dollars?

A. He asked me what was it in all.

Q. How much did you count?

A. I probably counted half of it.

MR. DOSS: Page 398, line 22. Judge, can I approach the witness?

THE COURT: You may.

Q. (By Mr. Doss) I direct your attention to page 398, line 22, sir. If you'd read that on the bottom to yourself.

A. Yes.

Q. And on that day when you were testifying, isn't it correct that you answered probably 3, $400?

A. Yes, I see.

Q. Now, other than that answer that I just showed **[361]** you, do you remember giving a different answer than the other two that we've already talked about —

A. No.

Q. — to that question?

A. No.

MR. DOSS: Can I approach, Judge?

THE COURT: Of course.

MR. DOSS: I'm sorry I didn't ask.

THE COURT: No, that's fine.

Q. (By Mr. Doss) I'm going to show you page 42. Do you remember taking a deposition in this matter back in 1999?

A. I think so, yes.

Q. Okay.

A. Yes.

Q. If you'd look down at line 22 and read to the bottom to yourself, sir. Do you remember giving a different answer on that day than the two that you've already given us?

A. No.

Q. Huh?

A. No.

Q. You don't remember that when you were asked the question, you didn't count it when you got back that you answered: No, what for? It wasn't my money.

[362] A. Uh-huh.

Q. So that's different than the other two answers that we've already talked about, right?

A. Yes.

Q. Now, whenever — whenever you said you saw Mr. Hurst bring in this clear container of money, he was holding it in his hands?

A. Yes.

Q. He had a hand on the top and a hand on the bottom?

A. Yes.

Q. And then when you were counting the money, did Mr. Hurst touch the bills?

A. Yes.

Q. Do you remember seeing any 50s or 100s in those bills?

A. No.

Q. I believe when Mr. Molchan was questioning you, you had indicated that Mr. Hurst had said that he had cut the — cut the woman and put her in the freezer. Is that right?

A. Yes.

MR. DOSS: Judge, may I approach the witness?

THE COURT: You may.

Q. (By Mr. Doss) I'm going to show you the [363] question on line 8 and ask you to read to line 10, sir. Do you remember answering the question differently in your prior testimony?

A. No.

Q. You don't remember the question being asked, Timothy Hurst never told you anything about cutting up somebody and putting them in a freezer? And you answering yes?

A. Yeah, after the fact, yes.

Q. Now, I think that you told Mr. Molchan that whenever the rings were purchased and you guys went back, that you were actually the one that went and got the money?

A. Yes.

Q. Do you remember answering that differently in prior testimony?

A. I don't know. I went and got the money out of my room.

MR. DOSS: Can I approach, Judge?

THE COURT: Yes.

MR. DOSS: I show you page 402, line 20 and ask you to read through line 25, sir.

Do you remember answering the question differently in your prior testimony?

A. No.

Q. So you don't remember being asked: Okay, when [364] you got back to your house, who got some money? You saying: Timothy. And then being asked: Do you remember how much he got? And you say: Three or $500, I don't know.

You don't remember that?

A. No. I remember getting the money but I don't quite remember how much it was.

Q. And you said you and Mr. Hurst were good friends when Mr. Molchan was questioning you, correct?

A. Yes, we were friends, yes.

Q. Do you remember answering that differently in your deposition?

A. No.

Q. I'm going to ask you to read on page 17, line 10. To the bottom of the page, sir.

Do you remember answering that differently when your deposition was taken in 1999?

A. No.

Q. You don't remember being asked the question: Oh, okay. Is he one of your better friends or just an acquaintance and you answering: He's just an acquaintance. You don't remember saying that?

A. No. Huh-uh. I remember telling he was a friend, yes.

Q. Do you remember telling the police that there was a plan to rob the Popeye's and the plan was for Mr. [365] Hurst to rob it and for you to be a watchout man?

A. No.

Q. And then do you remember later denying that?

A. Yes.

MR. DOSS: May I approach, Judge?

THE COURT: You may.

Q. (By Mr. Doss) Read page 457 and 458 to yourself, sir, and do you remember denying that you had ever said that that was the plan?

A. Yes.

Q. Do you also remember making the statement that Mr. Hurst had never mentioned robbing someone before that date?

A. No.

MR. DOSS: Judge, may I approach?

THE COURT: Sure.

Q. (By Mr. Doss) Please read from page 40, line 22, to page 41, line 7, sir.

Do you remember answering the question differently in your deposition?

A. No.

Q. You don't remember the question being asked: So you don't remember if he's ever discussed you and him doing a robbery? And it says shaking head. You've got to answer for the lady. And you answer, no.

[366] A.(No response).

Q. Do you remember making the statement that you — that you had said that Tim Hurst had slit the victim's throat with the box cutter but that you got it from reading in the newspaper?

A. He never told me what he did it with.

MR. DOSS: Page 454, line 24.

Q. (By Mr. Doss) If you'd read page 454, line 24 through 455, line 21, sir.

A. What number you said? Right here?

Q. Line 24 is where it starts. Here. Do you remember answering the question differently on that day?

A. Yes.

Q. Because you said that you said it because you saw it in the newspaper, right?

A. Yes, I seen that in the newspaper, the weapon, yes.

Q. So you really — so you told — you told them under oath, you said something that really wasn't true, it was just something that you got out of the newspaper?

A. About the weapon?

Q. Yes.

A. They didn't ask me what he did it with.

Q. Isn't it true that you were asked the question, and the question was: What did he say he was [367] going to do and your answer was: He said he was gonna rob Popeye's and kill the manager, come right up behind her and slit her throat.

And you're telling that you don't remember saying that?

A. No, not in that way, no.

Q. And that, it goes on in line 15 on page 455 it says: What did you tell them he did it with? And you say: A box cutter. A box cutter? Because I seen it in the newspaper.

A. Yes.

Q. Isn't it true that you told police that there was other people involved and that they received money from the robbery?

A. Yes.

Q. You told the police that it was Aundra Cary and Patrick Wallace, didn't you?

A. Yes.

Q. But the truth is, they didn't get no money, did they?

A. No, they didn't never get it, no.

Q. But you don't — do you remember telling the police that you gave them, those two the money so that they could split it up?

A. Yes, I remember saying that, yes.

[368] Q. And isn't it true that after — after you — after you testified in this cause originally, that you pled to an accessory after the fact to the murder of Cynthia Harrison?

A. Yes, I did.

Q. But that was only after you provided testimony?

A. Yes.

MR. DOSS: No other questions, Judge.

THE COURT: Mr. Molchan.

REDIRECT EXAMINATION

BY MR. MOLCHAN:

Q. So for your part, you did enter in a plea to accessory after the fact for your part in getting the money afterwards; did you not, sir?

A. Yes, I was charged with accessory after the fact, yes.

Q. Okay. And on that morning on August the 2nd, who is the person who brought the money to you? Who brought the money to you?

A. August the 2nd?

Q. On August — on the date — have I got it wrong? In 1998, May 2nd, who brought the money to you?

[369] A. Timothy.

Q. Whose pants had blood on them?

A. Timothy.

Q. Who told you to wash the pants?

A. Timothy.

Q. Who told you to hide the money?

A. Timothy.

Q. Who told you to put the items in the trash?

A. Timothy.

Q. And how old were you then, sir?

A. Fifteen.

Q. How old was he?

A. I don't even know.

Q. How big was he back then?

A. Maybe 220, I think, or a little bit over two.

Q. Was he bigger than you?

A. Yes.

Q. At any point in time did you tell, encourage Mr. Hurst to commit this crime?

A. No.

Q. Did you threaten him in any way to commit this crime?

A. No.

Q. Did you help him plan this crime in any way?

A. No.

Q. Did you own a car at that point in time?

A. No.

[370] Q. Back in 1998 in talking to the police, did you trust the police back then?

A. Yes.

Q. You did?

A. Yeah.

Q. Did you feel like you were — did you — did they promise you anything?

A. No.

Q. At any point in time? Did Mr. Rimmer promise you anything?

A. No.

MR. MOLCHAN: No other questions, Judge.

THE COURT: May he be excused?

MR. MOLCHAN: Yes, he can.

THE COURT: Mr. Doss?

MR. DOSS: Yes.

THE COURT: Thank you, Mr. Smith. You can step down. Mr. Molchan.

MR. MOLCHAN: Judge, we need to read Mr. Lee Smith, Sr.'s trial testimony.

THE COURT: That's fine. Are you going to have your assistant do it?

MR. MOLCHAN: Yes, yes, ma'am. It's very short.

Just for the record, Mr. Smith is deceased and [371] hence the reason for that.

Here's a copy for Your Honor.

THE COURT: And again, members of the jury, as with the deputy earlier this morning, this deposition was given under oath and you should give it the same weight as if he was here testifying in person.

MR. MOLCHAN: If I can proceed, Your Honor.

THE COURT: Yes.

WHEREUPON, LEE EARNEST SMITH,
having been first duly sworn, was examined and his testimony read as follows:

DIRECT EXAMINATION

BY MR. MOLCHAN:

Q. Will you state your name, sir?

A. My name is Lee Earnest Smith.

Q. Can you lean forward — can you lean forward a little bit towards that microphone?

A. My name is Lee Earnest Smith.

Q. Mr. Smith, is Lee-Lee Smith your son?

A. Yes.

Q. Back on May 1st of 1998, did you and your wife go out of town to Selma, Alabama?

A. Yes.

Q. When you returned on Sunday May the 3rd, did you find out there had been a murder at the Popeye's [372] restaurant?

A. Yes.

Q. And did you find out that the police wanted to question your son?

A. Yes.

Q. At some point, did the police come to your house?

A. Yes.

Q. Now, did they ask you to search your premises for anything unusual?

A. No, they didn't ask. They didn't ask us but we gave them permission that if they wanted to search, they could search.

Q. Okay. Did you yourself conduct any other search? Did you search for something?

A. I sure did.

Q. All right. What did you find and where did you find it?

A. I found a pair of tennis and, I believe, some pictures in the garbage can.

Q. And did you turn those items over to the police?

A. I did.

Q. Right there while they were there?

A. Right there while they were there.

[373] Q. Now, when you say "tennis", what are you talking about?

A. A big old pair of tennis shoes —

Q. Tennis shoes?

A. — about 12 or something like that.

Q. Let me show you State's Exhibit No. 37. Do these look like the shoes you found in your garbage can?

A. That's them.

Q. Okay. Did the police also take from your house a pair of blue pants?

A. Right, yes.

Q. Okay. And whose pants were those?

A. Mine. A pair of pants I paint in.

Q. Okay. And do you remember what size they were?

A. About 34, I believe.

MR. MOLCHAN: No further questions.

CROSS-EXAMINATION

BY MR. DOSS:

Q. Mr. Smith, did you and Mr. Rimmer talk about those blue pants yesterday or today?

A. Talk about the blue pants?

Q. Yes, sir.

[374] A. No, sir.

Q. Are you sure?

A. No, sir.

Q. Do you remember giving a deposition in this case?

A. I sure do.

Q. Do you remember you were under oath then in front of a court reporter?

A. Yes.

Q. Do you remember being asked this question, sir: Now, on the bed, Lee-Lee's bed, the police said that they took with them a pair of dark blue trousers. Do you know anything about that?

A. Those was mine.

Q. Were you asked that question, sir?

A. Well, yeah, that's mine.

Q. All right. Now, do you remember what your answer was?

A. They was my pants. The answer was my pants; and they was a pair of pants that I painted in.

MR. DOSS: May I approach the witness, Judge?

THE COURT: You may.

Q. (By Mr. Doss) Sir, do you remember if at that time under oath your answer was: I really don't — I don't remember. My wife might.

A. My wife might?

Q. Was that your answer, sir?

[375] A. I told them that was my pants. I know my pants. That they was my pants.

Q. Is that what that says, sir?

A. I told them they was my pants.

Q. Right.

MR. DOSS: I don't have any other questions.

MR. MOLCHAN: No further questions.

THE COURT: You may step down.

MR. MOLCHAN: Call John Sanderson.

SECURITY OFFICER: Watch your step.

THE CLERK: Please raise your right hand.

(Witness sworn)

MR. MOLCHAN: If I can proceed, Your Honor?

THE COURT: You may.

WHEREUPON, JOHN SANDERSON,
having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MOLCHAN:

Q. Could you state your name, sir and spell your last name?

A. It's John Sanderson, S-A-N-D-E-R-S-O-N.

Q. Now, are you currently retired?

A. Yes, I am.

Q. And were you a law enforcement officer with [376] the Escambia County Sheriff's Office and also with the State Attorney's Office?

A. Yes.

Q. How many total years of law enforcement did you have?

A. Twenty-five-and-a-half years.

Q. Now, drawing your attention to May 2nd of 1998, were you involved in the investigation in the death of Cynthia Harrison that occurred at the Popeye's?

A. Yes, I was.

Q. Now as part of that investigation, did you go to the home of Lee-Lee Smith on Basin Street?

A. Yes, I did.

Q. And when did you go there?

A. That would have been on May the 3rd of 1998.

Q. And who did you contact when you went there?

A. I ended up contacting his mother and his father, Mr. and Ms. Smith.

Q. Okay. And when you got there, were you shown some money that was found in Lee-Lee's room?

A. Yes.

Q. I show you State Exhibit 1, first of all. Well, State's Exhibit 1 and State's Exhibit 2. I show you basically State's Exhibit 1 and State's Exhibit 2.

Do you recognize those photos, sir?

A. Yes.

[377] Q. What are they photos of, sir?

A. Large amount of U.S. currency in a Tupperwear type container and a round metal — or tin with change in it.

Q. Now, while you were there, did you also ask for permission to go search through the house?

A. Yes, we did.

Q. Okay. And did you also ask them to participate, that being Mr. and Mrs. Smith and help search for anything unusual?

A. Yes, we did.

Q. And did Mr. Smith go outside and did he return with anything?

A. Yes, he did.

Q. And what did he return with?

A. He came back with some large tennis shoes with what appeared to be blood — bloodstains on them.

Q. Okay. And State's Exhibit 37 is in front of you. Are those the shoes that were brought to you?

A. Yes.

Q. Now, inside — where did the shoes come from?

A. From a green county garbage can that was in the backyard of their residence.

Q. And did you actually look inside the can?

[378] A. Yes, I did.

Q. And did you look in and see — what did you see inside the can?

A. I saw a little small black purse.

MR. MOLCHAN: If I could approach the witness, Judge.

THE WITNESS: Purse-type.

Q. (By Mr. Molchan) Showing you State's Exhibit 16, do you recognize State's Exhibit 16?

A. Yes, do I, the black purse, yes.

Q. Okay. Now, there's a black purse and in the photograph, there's another of — a number of items in there. After you got that information, did you call for crime scene personnel to help out?

A. Yes, we did. Yes.

Q. And did they — what did they do when they got there?

A. Well, they came. I backed away as soon as I saw the purse and we knew the shoes and they conducted their crime scene investigation of the can and with the money, also.

Q. Do you recall who it was that came out to the location?

A. I believe it was Mike Hallmark, I believe.

MR. MOLCHAN: If I could approach the witness, [379] Your Honor.

THE COURT: You may.

Q. (By Mr. Molchan) I'm showing you a copy — or a photograph, State's Exhibit 19. Do you recognize that, sir?

A. Yes.

Q. And what is State's Exhibit 19?

A. It's the green garbage can in the backyard of their residence.

Q. And basically, then, the processing of that came back to Mr. Hallmark, who basically put everything together?

A. Yes.

Q. Okay.

MR. MOLCHAN: No other questions, Judge.

THE COURT: Mr. Doss?

MR. DOSS: Yes, Judge.

I don't have any questions, Judge. Thank you.

MR. MOLCHAN: No other questions, Judge.

THE COURT: May he be released?

MR. MOLCHAN: Yes, he can.

THE COURT: Mr. Doss.

MR. DOSS: Yes.

THE COURT: Thank you, sir. You may step down.

[380] MR. MOLCHAN: Let me retrieve those exhibits, Judge.

At this point in time, I'll call Mike Hallmark.

SECURITY OFFICER: Watch your step.

THE CLERK: Please raise your right hand.

(Witness sworn)

WHEREUPON, MIKE HALLMARK,
having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MOLCHAN:

Q. Could you state your name, sir?

A. Mike Hallmark, H-A-L-L-M-A-R-K.

Q. And your current profession or occupation?

A. I'm a crime scene trainer for the state department.

Q. Now, drawing your attention back to May 2nd of 1998, were you employed?

A. Yes, sir, by the Escambia County Sheriff's Office.

Q. And your duties with the Escambia County Sheriff's Office in 1998?

A. I was a crime scene investigator and a forensic science officer.

[381] Q. Okay. Now, basically in this particular case, did you begin working on the crime scene at the Popeye's or assisting the working of the crime scene at the Popeye's restaurant proper?

A. No, sir. Other officers responded to the scene at Popeye's.

Q. Okay. Did you ultimately later become involved in that processing or of another scene?

A. Yes, sir, I did.

Q. Do you recall going to a Basin Street address; do you recall that?

A. Yes, sir, I do.

Q. Approximately what time did that occur, approximately?

A. It was later in the afternoon, almost — just a few minutes prior to 5 o'clock in the afternoon.

Q. Okay. And were there other officers at that particular location?

A. Yes, sir. I made contact with investigator Buddy Nesmith and Sergeant Tracy Yuhasz.

Q. Okay. And did you recover evidence from that particular scene?

A. Yes, sir, I did.

Q. From where did you recover this evidence?

A. I recovered it primarily from two spots, two [382] locations. One was in a trash can that was outside and the second was inside a bedroom inside the residence.

Q. Now, was Sergeant Sanderson present at that location, also?

A. Yes, sir, I remember seeing him there that day.

Q. Now, you indicated that there was a trash can.

MR. MOLCHAN: Could I approach, Your Honor?

THE COURT: You may.

Q. (By Mr. Molchan) I'm showing you what has been previously marked as State's Exhibit 19.

Does State's Exhibit 19 accurately depict the trash can that you're talking about at the Basin Street address?

A. Yes, sir. This is a photograph that I took at the Basin Street address on that date.

Q. Now, how did you go about going through the particular trash can at this point in time?

A. I took photographs of the outside area that this overall photograph shows. I also took close up photographers of the trash can and noted the serial number of the trash can in my report. At that time, I was — I was gloved and I had that and my camera and I started what we call an archeological survey.

In other words, we take the trash can and we [383] do layer by layer by layer and annotate each layer, lay it out on a sheet of clean paper and photograph it for evidence.

Q. Now, did you recover a number of items that became connected to the Popeye's robbery and murder?

A. Yes, sir, I did, from the trash can.

Q. And did you photograph those items, also?

A. Yes, sir. I photographed them as they were in the can and then after they were removed, I placed them out so they could be identified further.

MR. MOLCHAN: If I could approach the witness, Your Honor?

THE COURT: Yes.

Q. (By Mr. Molchan) I'm going to show you State's Exhibits 18, 20, 16, 15, 14, and then 17.

Do you recognize all of those photographs, sir?

A. Yes, sir, I do.

Q. And do those truly and accurately represent the contents of what you found inside the trash can at the Basin Street address?

A. Yes, sir, these are the items that I recovered from the trash can that are laid out on a large paper sack for photographing.

Q. And did you go ahead and collect those items?

[384] A. Yes, sir, all these items were collected and annotated on a property receipt.

MR. MOLCHAN: If I could approach, Your Honor.

THE COURT: You may.

Q. (By Mr. Molchan) I show you a number of items, starting with State's Exhibit 51, sir. Do you recognize that exhibit, sir?

A. Yes, sir, this is evidence that I collected in the case. It's annotated by the evidence tape along with my initials and my call sign number.

Q. Okay. And if you could, when those items are collected, is there a specific number that goes with, say, the items and the case?

If you could explain that to the folks on the jury.

A. Yes, sir. On the top of the — excuse me — large manila envelope, this seal's obviously been broken there but on the original seal, red tape, evidence tape after the item's placed inside, I place my initials and my call sign number on the back in my handwriting and the item is sealed. It's placed into evidence.

On the outside of the manila envelope is the case number that's assigned by the radio room. This is 98S, Sierra, for the sheriff's office, 010656. There was item No. 11 on my property receipt. And this annotates what is [385] in the envelope, which is a coin purse with ID and keys. Item No. 11.

Q. You have an item for it and then we have another exhibit number?

A. Oh, yes, sir. Sorry.

Q. 51?

A. Yes, sir. Sorry.

Q. I just want to be clear.

A. Oh, yes.

Q. I'm also showing you State's Exhibit 54. Do you recognize that?

A. Yes, sir. This is my handwriting, my seal on the back. Same case number, our item No. 18 on our property receipt, which contains two socks. It's also marked biohazard so it possibly had some type of fluid on it.

Q. Okay. And then State's Exhibit 53.

A. Yes, sir. My handwriting. My seal and initials. Pardon me, sir. And contains our item No. 14, a bank deposit slip.

Q. And then item 52.

A. The larger envelope, item 52. My initials and call sign number on the back. Sealed. My handwriting. Item No. 12. And it contains a plastic bank bag.

Q. And these were the items found and contained within that garbage can at the Basin Street address?

[386] A. Yes, sir, they were. They — yes, sir.

Q. Now, the socks that were contained inside, I think it's 54?

A. Yes, sir, State's Exhibit No. 54.

Q. Where were they located as far as the garbage can? Were they contained within anything, within the object inside the garbage can?

A. The socks were contained inside the bank bag, the First Union Bank bag.

Q. Now, in addition, did you also recover a pair of — a set of tan pants from — during the course of this investigation?

A. Yes, sir, I did. Along with my duties as a crime scene investigator, I'm also an evidence custodian or technician so that after hours when the property room is closed, we're allowed to take into evidence. But in relationship to this case, I took in a pair of tan pants from Sergeant Yuhasz.

MR. MOLCHAN: If I can approach, Your Honor?

THE COURT: You may.

Q. (By Mr. Molchan) I'm showing you what's been previously marked as State's Exhibit 55.

A. Yes, sir. Again, it's a seal, evidence seal with my initials and call sign number. The same case number with the item. And it's marked tan work pants that I [387] received in the course of this investigation.

Q. Now, in addition to the — I'll call it the excavation that you did inside the garbage can —

A. Yes, sir.

Q. — did you also recover items, or recover money from inside of Lee-Lee Smith's house at the Basin Street address?

A. Yes, sir, I did. With Mr. Lee, Sr., we were taken to the bedroom where we observed on the bed a Sterlite brand, like a plastic shoe box, Sterlite brand that contained money.

Q. Okay. Now, did you also find any other type of box that contained money in the room?

A. Yes, sir, we found a round aluminum or metal type tin, like a — I guess what you'd call a fruit cake tin —

Q. Okay?

A. — that it would come in.

Q. And did that have money in it, also?

A. Yes, sir, it did.

MR. MOLCHAN: If I could approach, Your Honor.

THE COURT: You may.

Q. (By Mr. Molchan) Let me show you State's Exhibits 1 and 2. Again, do you recognize that, sir?

A. Yes, sir, these are photographs that I took [388] located on the bed in the bedroom at the Basin Street address.

Q. Now, as far as the currency, sir, when you took that money into custody, did you count the money?

A. Yes, sir, I did.

Q. How much in — and I'll use paper currency, was present inside that plastic container?

A. May I refer to my notes?

Q. That's fine.

A. Okay. Any time evidence of a monetary value, currency, is seized, it's place on what we call a cash count form. During the course of this investigation, from the box I received a total of $523 U.S. dollars.

Q. And you go through it and count it?

A. Yes, sir. It's annotated out. I had 14 $20 bills.

Q. Okay, we don't need to go into that.

A. Oh, sorry. It's in denominations on the cash form.

Q. But there was $523, total?

A. Yes, sir. Yes, there was.

Q. And were there 50s in there?

A. No, sir, there were no 50 or $100 bills.

Q. And as far as the coins, did you count that, also?

[389] A. Yes, sir, I did. It was all coins and it contained a total of $16.08.

MR. MOLCHAN: Judge, if I can go ahead and publish some of the photographs and have Mr. Hallmark —

THE COURT: You may. Do you want the witness off the stand?

MR. MOLCHAN: Yes, please.

THE COURT: Please, sir.

MR. MOLCHAN: It doesn't seem to be — there we go.

Q. (By Mr. Molchan) Okay. First of all, I show you State's Exhibit No. 1. And that's — now, is State's Exhibit 1, is that the tin that you were talking about?

A. Yes, sir, this is a photograph that I took of the tin can.

Q. Okay. And that's what had the coin —

A. Coins only, yes, sir.

Q. Okay. And this is State's Exhibit No. 2. And what is — that is — State's Exhibit No. 2 is the currency that we're talking about?

A. Yes, sir, contained in the clear Sterlite brand plastic box.

Q. Okay.

MR. MOLCHAN: Publishing State's Exhibit 19.

[390] Q. (By Mr. Molchan) Now, this is State's Exhibit 19. Could you describe what this location is, basically, sir?

A. This is a fair and accurate representation of the photograph that I took at the rear of the Basin Street address. It shows the rear door of the house, the attachment, the small shed and the trash can in its position upon my arrival.

Q. Now, I'm pointing to a green or kind of a large, dark object. Is that the trash can that we're talking about?

A. Yes, sir.

Q. Just to be clear?

A. It's a trash can on wheels like you'd wheel out to the curb.

Q. Okay. Now, you indicated — this is State's Exhibit 16. Now, at the top of that is a black type of object?

A. Yes, sir.

Q. And what was that, sir?

A. I described that in my case notes as a black coin purse.

Q. Okay. And then the contents you have basically displayed below there?

A. Yes, sir, the contents were displayed on that [391] sack.

Q. And that was State's Exhibit 16. State's Exhibit 15. Now, below that, did you photograph a little closer up?

A. Yes, sir. For identification purposes, I took a closer up photograph of the Louisiana driver's license of the victim.

Q. And that was present in 16 just below —

A. Yes, sir.

Q. — the black purse?

A. Yes, sir.

Q. Displaying State's Exhibit No. 18. Let me move this back a bit. Okay. This is State's Exhibit 18 and what is — what is in State's Exhibit 18? This was found inside the garbage can that was previously depicted?

A. Yes, sir, it is. This is a gray, plastic First Union Bank bag, what they call a work bag that they issue to the businesses.

It's marked with serial number AP1217240. It's noted from, from Popeye's with the date of 5/1/98. Prepared by Cynthia.

Q. That's what's on —

A. Written in that box, yes, sir.

Q. Now, is this a photograph of it without — with the contents still in it where —

[392] A. Yes, sir. This is a photograph of the contents with the — the bag as it was received out of the trash can.

Q. And then State's Exhibit 14. This may be a little bit better. Okay. And the content that were inside the gray bag?

A. Yes.

Q. And the socks?

A. Yes, sir. There's two socks that were inside the bag. Both white in color. Athletic style. One was a calf-length size sock and the other was an ankle-type sock. So one tall, one short, keys, a pencil, piece of notebook paper, a bank receipt and a small black and white pocket notebook.

Q. You collected those items that were contained in the previous —

A. All of those items were collected and separated out on a property receipt.

Q. And then this basically, was the deposit slip collected?

A. Yes, sir. If you notice on the left-hand side of the photograph, that's the bank bag itself, this is just a closeup photograph of the bank deposit for First Union

from Popeye's signed by Cynthia in the amount of $1,751.41.

Q. And this is a photograph item — Exhibit 17.

[393] A. Yes, sir. This is a photograph that I took of the sock to show the red stain that I believed to be blood on it and along with a scale to show the sizing for proportions.

MR. MOLCHAN: Let me check my notes real quick, Judge.

No other questions, Judge, of the witness. I'll go ahead and move things around.

THE COURT: Mr. Doss, are you going to need the pictures?

MR. DOSS: No, Judge.

THE COURT: Please.

THE WITNESS: Thank you.

MR. DOSS: Judge, can I approach?

THE COURT: Sure. Do you need the court reporter?

MR. DOSS: No.

(Bench conference off the record)

MR. DOSS: Judge, can I approach the witness?

THE COURT: Sure.

MR. DOSS: Sir, I have some gloves for you.

THE WITNESS: Thank you.

MR. DOSS: Because I'm going to ask you to take some of those items out. I saw the biohazard sign there.

[394] THE WITNESS: That's what we call a clue, sir.

CROSS-EXAMINATION

BY MR. DOSS:

Q. Now, I know Mr. Molchan had asked you about those pants?

A. Yes.

Q. I was hoping that you'd be able to take those out so that we could just publish those pants to the jury. Not that they need to touch them or anything, but if you could just pull them out towards them and bring them down so that we can see what they look like.

A. Yes, sir. We're referring to the tan work pants, sir?

Q. Yes, sir. I believe it's Exhibit 55, is what I had written down.

A. Yes, sir.

Q. Can you hold those up so the jury can be able to see them?

A. Yes.

Q. All right. I appreciate it. And do you recall whenever you went to the Smith house finding a knife in Lee-Lee Smith's room?

[395] A. Yes, sir, I did.

Q. And isn't it true that you found that knife with the money containers?

A. Yes, sir, I did.

Q. And I believe that you had measured the blade at three-and-a-half inches?

A. If I could refer to my notes?

Q. Absolutely.

A. Yes, sir, one Schrade lock-back knife.

Q. Do you know if that was checked for blood?

A. It was submitted to the FDLE along with the other evidence.

Q. Do you know if it was tested for DNA?

A. No, sir, I'm not sure.

Q. Do you know if it was dusted for prints?

A. No, sir, it wasn't. Not by me.

Q. Okay. Now, you actually went to the — to the autopsy?

A. Yes, sir, I did.

Q. And your purpose at the autopsy was to do a lumi light to search for hair or fiber on Ms. Harrison's body?

A. Yes, sir, I was assisted by Florida Department of Law Enforcement Investigator Jan Johnson.

Q. Because you were looking for some kind of evidence to help you out, right?

A. Any type of hair, fiber, fluid.

Q. And now you actually were never — Mr. Hurst [396] went to the police station on May 2nd. You were the one that swabbed his hands, right?

A. Yes, sir, I collected, with Mr. Hurst's permission I collected fingernail scrapings and hand swabs.

Q. And he gave those voluntarily?

A. Yes, sir, he did.

Q. Do you know if any of those voluntary swabbings ever matched up with any of this lumi light or any of this other?

A. No, sir. I did the identification and collection. Those were submitted to the Florida Department —

Q. So you didn't do any analysis?

A. No, sir, they're submitted to the lab for analysis.

Q. Okay. So you wouldn't know either if the blood on the shoes or the socks was ever tested?

A. No, sir, they were submitted — they were submitted by our office for testing.

Q. Okay. All right. Wrong person, sorry.

A. No, that's fine.

MR. DOSS: No other questions, Judge.

MR. MOLCHAN: Just one quick follow up.

REDIRECT EXAMINATION

BY MR. MOLCHAN:

[397] Q. Now, as far as the swabs of Mr. Hurst's hands, did you observe any visible blood on Mr. Hurst's hands when you swabbed them?

A. No, sir. This was a day —

Q. About what time was it, too? I'm sorry to interrupt.

A. It was later in the afternoon. I can refer to my notes, if you'd like.

Q. If you could, please.

A. It was on May the 2nd at approximately 1800 hours. 6 o'clock in the evening, sorry. We use military time.

Q. So at that point in time — this is over, close to ten hours after the first call to Popeye's or around in that area? Over eight hours, at least?

A. Yes, at least over eight hours, yes, sir.

MR. MOLCHAN: No other questions, Your Honor.

THE COURT: May he be excused?

MR. MOLCHAN: Yes, he can.

THE COURT: Thank you, sir.

THE WITNESS: Thank you, ma'am.

MR. MOLCHAN: Judge, if I can just go ahead and just clean up around there a little bit.

THE COURT: That's fine.

MR. MOLCHAN: Another witness will be coming [398] in.

Call Buddy Nesmith.

THE COURT: All right, sir. You've been previously placed under oath. You are still under

oath.

MR. MOLCHAN: If I can go ahead and continue, Your Honor.

THE COURT: Of course.

(Conclusion of Volume II)

No. 14-7505

IN THE

Supreme Court of the United States

SUPREME COURT, U.S.
FILED
MAY 28 2015
OFFICE OF THE CLERK

TIMOTHY LEE HURST,
Petitioner,

v.

FLORIDA,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

JOINT APPENDIX
VOLUME III OF III (JA 647–JA 1008)

PAMELA JO BONDI
ATTORNEY GENERAL OF FLORIDA
ALLEN WINSOR
SOLICITOR GENERAL
CAROLYN M. SNURKOWSKI
ASSOCIATE DEPUTY ATTORNEY GENERAL
Counsel of Record
OFFICE OF THE ATTORNEY GENERAL
PL-01, The Capitol
Tallahassee, FL 32399-1050
(850) 414-3300
carolyn.snurkowski@myfloridalegal.com

Counsel for Respondent

SETH P. WAXMAN
Counsel of Record
CATHERINE M.A. CARROLL
DAVID M. LEHN
FRANCESCO VALENTINI
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
seth.waxman@wilmerhale.com

Counsel for Petitioner

ADDITIONAL COUNSEL LISTED ON INSIDE COVER

PETITION FOR CERTIORARI FILED DECEMBER 8, 2014
CERTIORARI GRANTED MARCH 9, 2015

NANCY A. DANIELS
PUBLIC DEFENDER
DAVID A. DAVIS
ASSISTANT PUBLIC
DEFENDER
Leon County Courthouse
301 South Monroe Street
Suite 401
Tallahassee, FL 32301

MARK E. OLIVE
LAW OFFICES OF
MARK E. OLIVE, P.A.
320 West Jefferson Street
Tallahassee, FL 32301

Counsel for Petitioner

ERIC F. FLETCHER
ALLISON TRZOP
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109

TABLE OF CONTENTS

VOLUME I

Page

Docket Listing excerpts for the Supreme Court of Florida, Case No. SC12-1947 1

Docket Listing excerpts for the Supreme Court of Florida, Case No. SC12-345 5

Docket Listing excerpts for the Supreme Court of Florida, Case No. SC07-1798 8

Docket Listing excerpts for the Supreme Court of Florida, Case No. SC00-1042 11

Docket Listing excerpts for the Circuit Court of the First Judicial Circuit in and for Escambia County, Florida, Case No. 1998 CF 001795 A 14

Opinion of the Supreme Court of Florida, dated April 18, 2002 27

Florida Circuit Court Order Denying Defendant's Motion to Vacate Judgment of Conviction and Sentence, dated August 23, 2007 53

Opinion of the Supreme Court of Florida, dated September 17, 2009 127

Florida Circuit Court Order Denying Motion for Evidentiary Hearing for Determination of Mental Retardation of the Defendant, dated February 23, 2012, with Attachment #1 (excerpts of Order Denying Defendant's Motion to Vacate Judgment of Conviction and Sentence, dated August 23, 2007) 193

Jury Instructions, filed March 9, 2012 207

TABLE OF CONTENTS—Continued

Page

Jury Verdict, filed March 9, 2012 217

Transcript of *Spencer* Hearing, dated April 4, 2012 218

State's Memorandum of Law in Support of the Jury's Recommendation of Death, filed April 23, 2012 230

Defendant's Sentencing Memorandum in Support of Life, filed June 28, 2012 238

Sentencing Order, dated August 16, 2012 258

Florida Circuit Court Judgment and Sentence, dated August 16, 2012 272

Opinion of the Supreme Court of Florida, dated May 1, 2014 289

Supreme Court of Florida Order Denying Motion for Rehearing, dated September 4, 2014 322

VOLUME II

Transcript of Resentencing Hearing
Volume I, March 5, 2012 323
Volume II, March 6, 2012 478

VOLUME III

Transcript of Resentencing Hearing (continued)
Volume III, March 6-7, 2012 647
Volume IV, March 7-8, 2012 789
Volume V, March 9, 2012 956

IN THE CIRCUIT COURT
IN AND FOR ESCAMBIA COUNTY, FLORIDA

STATE OF FLORIDA,

vs.

TIMOTHY HURST,
Defendant

CASE NO: 1998-CF-001795

RESENTENCING HEARING
TRANSCRIPT OF PROCEEDINGS

VOLUME III

* * *

[404] (Continuation of proceedings held 3/6/12)

WHEREUPON, DONALD BUDDY NESMITH, JR. having been recalled to the stand, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MOLCHAN:

Q. Now Mr. Nesmith or Sergeant Nesmith, during the course of your investigations, did you come in contact with a person by the name of Carl Hess who worked at the Wendy's?

A. Yes, sir.

Q. And did there come a time when you showed Mr. Hess a photographic lineup of six individuals with similar features?

A. Yes, sir.

Q. Now, how is it that you go through the process of showing a photographic lineup to a witness and going back to 1998?

A. Well, at this time we were under — we were in the process — technology has come so fast, so quick with us. At this particular time, we had just got what they — what we have now it's called the criminal intelligence unit. They are just being formed. We were just in the process of the computerized technology we have now. It was in its infancy. They were — they have — at that time were — as [405] is now, do lineups for us on a consistent basis but it was, we were in the trial run.

And this is the one that — when they were formed and it started, this is the product of what they made for me.

Q. Now, how is it that you went about showing Mr. Hess? What did you tell him? How did you go about the process of showing him the photo lineup?

A. I met with Mr. Hess. We have a form on it to where we tell him we're going to show him six photographs; that the person may or may not be involved here. If as he's looking at it if he sees anybody he recognizes, please point to the photograph and I have some follow up questions after that.

Q. And did you engage in that process with Mr. Hess?

A. Yes, sir.

MR. MOLCHAN: If I could approach. I'm showing Sergeant Nesmith State's Exhibits 47-B and 47-C.

Q. (By Mr. Molchan) Do you recognize 47-B and 47-C?

A. Yes, sir.

Q. And did Mr. Hess pick out anybody?

A. Yes, sir, he identified photo No. 6.

[406] Q. And who was the person in photograph No. 6?

A. Identified as Timothy Hurst.

Q. Timothy Hurst, is he present in the courtroom today?

A. Yes, sir, sitting at the table in the green shirt.

MR. MOLCHAN: If the record would reflect that he's correctly identified the defendant.

THE COURT: Let the record so reflect.

[407] Q. (By Mr. Molchan) Okay. And did he sign off on that, that being Mr. Hess?

A. Yes, sir, he signed off on the front with the time and — or actually with the date and his signature and also on the back of the — it's the identification record form that we have.

Q. Now, during the time, did you have — let's draw your attention to May the 3rd of 1998. Did you interact with Mr. Hurst at that point in time?

A. Yes, sir.

Q. Okay. And during the course of your investigation, did you obtain a pair of shoes from Mr. Hurst that he was wearing?

A. Yes, sir.

MR. MOLCHAN: If I could approach, Your Honor?

THE COURT: You may.

Q. (By Mr. Molchan) Now, when did you have — I think we described it as May the 3rd of 1998. Do you recognize that exhibit, sir, that being — let's make sure I've got the number right — is it 49? Make sure.

A. Yes, sir.

Q. Yeah, 49. And where did those come from?

A. These come from — I think they come out of the car.

Q. Okay. But they were — how did you link them to Mr. Hurst?

A. Being in the same size and everything and in his car and then we linked them back to the Wal-Mart as being purchased.

Q. What size are those?

A. Size 14.

MR. MOLCHAN: If I can approach, Your Honor?

THE COURT: You may.

Q. (By Mr. Molchan) This is State's Exhibit 37. What size were those, sir, if you can recall?

A. These are size 14.

Q. Now —

MR. MOLCHAN: If I could approach the witness, Judge. Or let me —

(Discussion off the record between counsel)

MR. MOLCHAN: If I could approach the witness, [408] Your Honor?

THE COURT: You may.

Q. (By Mr. Molchan) In working in this case, did you basically work together with Mr. Rimmer to put together an exhibit, I believe it's No. 39, that kind of puts the locations of the persons in this case so you could see it visually?

A. Yes, sir.

Q. And is that State's Exhibit 39 a true and accurate map that depicted the locations of various persons?

A. Yes, sir.

Q. It may be easier just to have him step down, Judge, instead of moving this one exhibit.

THE COURT: That's fine.

MR. MOLCHAN: If he could step down.

THE COURT: That's fine.

MR. MOLCHAN: And the jury will have this to come back.

Q. (By Mr. Molchan) Now, this is State's Exhibit 39. And just if you can, I know it's kind of hard to do, but this — if you can approach this?

A. Oh, okay. Uh-huh.

Q. Now, can you orient the jurors to where — let's say the Popeye's and the Wendy's are?

A. Sure. Sure. This is Highway 29. This is [409] Nine Mile Road. Okay? If you're familiar with this, there's Chemstrand Road here and the Popeye's and Wendy's are here. And to orient now, it's the Big Lots shopping Center where it is now.

I don't think it was Big Lots back then but that's what it is now, the shopping center. And these two establishments are out toward Nine Mile Road. And there's a road that goes in between them and I don't know the name of it. I can't — Music Lane goes in between them.

Q. Now, there was a location where Mr. Kladitis indicated the Barnes Feed and Seed store. Is that also on this particular —

A. Yes, sir. It's here south of Nine Mile Road on Old Palafox. Just south — just a little north of Johnson Avenue, if you know where that's at.

Q. And then did you know the location of Mrs. Harrison's residence?

A. Yes, she lived in a trailer park which is just south of Olive Road. Just keep going South on old Palafox just before the interstate where Old Palafox crosses over the interstate. The trailer park is just north of there.

Q. And the location of both Lee-Lee Smith and Mr. Hurst where they maintained their residences?

A. Yes, which is off of Untreiner, which is on the west side of Highway 29, down here just north of the [410] interstate in a subdivision right over there.

Q. Now, at the time you talked — or encountered Mr. Hurst, can you give a basic size of Mr. Hurst at that point in time when you saw him on I think it's May the 3rd and May the 2nd?

A. The best I could do was tell you he was – he was — he was taller than I was and I put him close to six foot. That's a guess on my part. And he was heavier than I was.

Q. I hate to — how approximately are we talking about?

A. Maybe 290, 300. Again, that's a guess on my part.

MR. MOLCHAN: No other questions of the witness, Judge.

THE COURT: Mr. Doss.

CROSS-EXAMINATION

BY MR. DOSS:

Q. Good afternoon, sir. Now, Mr. Hurst, you actually were the ones that were — you took the pants from him, the khaki pants?

A. Yes, sir.

Q. And the black — the black Reebok tennis shoes were taken at the same time?

A. Yes, sir.

[411] Q. And that's whenever he had come down to speak with you at the station?

A. Yes, sir.

Q. And that was when he also voluntarily allowed you to scrape his fingernails and swab his hands? I know it wasn't you but —

A. Right, that's correct.

Q. But you were there, right?

A. Yes, sir.

Q. And it was at your request?

A. Yes.

Q. Even though you weren't the one that was performing it, right?

A. Yes, sir.

Q. He also gave you fingerprints?

A. Not — yes, sir, I believe so.

Q. And permission to search his car?

A. Yes, sir.

Q. And that was all voluntary?

A. Yes, sir.

MR. DOSS: I don't have any other questions, Judge.

MR. MOLCHAN: He can be excused, Your Honor.

THE COURT: All right. Thank you, sir.

MR. MOLCHAN: Call Jack Remus.

[412] THE COURT: I tell you, hold off a second. Let me see counsel.

I do not need the court reporter.

(Bench conference off the record)

THE COURT: You can bring in the witness. And members of the jury, in every trial, after lunch, after people have had a meal and they come back in and I don't know what it is about this building, but it freezes in the morning and it's hot in the afternoon and everybody gets tired.

Understand that our focus is constantly on you and trying to make you folks happy. So if someone is sleepy and — don't stand on ceremony, don't feel embarrassed, if you need to stand up, stand up and stretch or if you need a break, raise your hand. Because I know

how difficult it is in the afternoon but it's critical that you hear everything. Okay?

Come on up.

SECURITY OFFICER: Watch your step.

(Witness sworn)

WHEREUPON, JACK REMUS,
having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MOLCHAN:

[413] Q. Could you state your name, sir.

A. Jack Remus R-E-M-U-S.

Q. And drawing your attention back to 1998, how were you employed?

A. I was employed as a senior crime lab analyst with the Florida Department of Law Enforcement at the Pensacola Regional Laboratory.

Q. Now, are you still with the Florida Department of Law Enforcement?

A. No, sir.

Q. And basically, what did you do — or what are you doing now?

A. Right now I'm working with the Health Department and I'm also a forensic consultant.

Q. Now, drawing your attention back to the time at the Florida Department of Law Enforcement, you were a senior crime lab analyst.

Did you have a particular specialty back at that time frame?

A. At that particular time, most of us were pretty general in the sense that we all did serology, which was blood testing and other bodily fluids, but we also did DNA testing and I was one of the ones who was doing DNA.

Some of the serologists were not doing DNA yet at that time.

[414] Q. So you were involved in the serology and DNA examination?

A. That's correct.

Q. Now, could you describe basically your education and — educational background and training you received in that particular situation?

A. Sure. I have a bachelor's degree in biology and a master's degree in biology with a concentration in molecular genetics, which is basically biochemistry and that sort of thing.

The minimum requirement for the position was a bachelors degree. This a natural science so I qualified on that basis. The other thing that normally happens at the time that we were working then, which was when I was hired it was 1988, was you were also sent off to Tallahassee to the serology training program, which took about a year, and taught you all the different tests and so on that were used for serology at that time.

And then you completed some case work under supervision and were given a certification as a serologist. And that happened by October 1989.

Q. Now, what type of DNA testing were you doing with the Florida Department of Law Enforcement at that time?

A. The technical name for it was PMDQA1 or poly marker, which was a six marker system that used blue dots to [415] identify a particular genetic profile.

Q. And at this point in time, drawing your attention back to 2000 — really to the year 2000, had you testified as an expert regarding body fluids, DNA, blood and DNA?

A. Several times at that point.

Q. Okay.

A. Correct.

Q. Now, if you can, kind of describe the process that you've described that you utilized in this particular case back in 1998, in that time frame.

A. Okay. It's been fourteen years but I'll try — I'll try to briefly. Basically it's a three-part process. The materials that contained blood or other bodily fluids are extracted for DNA.

In other words, you go through a series of washes and cuttings and so on to extract and end up in a small tube a selection of some biological material that you're pretty sure contains DNA.

The second step in the process is called PCR, which is polymerase chain reaction and basically what it is, it's the same process that your cells use to make more DNA, to make cells that you need to replace the cells that you will wear out in the normal course of life but we've engineered a process where it basically takes the DNA that [416] we got from the sample and amplifies it, makes copies of it so that there's a large amount of it available.

The third part is the typing part, which basically used a strip containing — and I hate to diverge a little

bit here but let me back up and talk a little bit about DNA. It's a ladder shaped molecule. The sides, the rungs of a ladder, are just structure material, sugars that hold it together.

The rungs of the ladder, however, are a two-part protein or actually it's a nucleic acid that go together with a coating of A to T and G to C — I won't bore you with the long names for them but basically what you get then, is if you open up the ladder, the code on one side is the exact complement to the code on the other side.

So if you open up a piece of DNA and you have the raw materials, the little nucleotides, the As and the Ts and the Gs and the Cs, you can match them up and build another ladder exactly like the first ladder that's perfect one code at a time.

Okay. Back to the strips that we use. The strips contain little pieces of complementary DNA for a particular gene expression, which is called an allele that you get from your parents when they made you. You get two expressions, like A and B. A from mom; B from dad, let's say.

[417] On those strips is a complementary strand pattern. You challenge, which is what we call it, when you mix the amplified DNA, with the strip and any of them that stick exactly perfectly, match up, you can then match up with a blue dye and get a blue dot. So what the blue dot on the strip means is that you have successfully matched up the exact same complementary strand as the unknown DNA sample.

What that does, it enables you to say that that particular person, let's say, for example, has a GYPA marker of AB. In other words, the A strip lit up and

the B strip lit up. Had they only had A type DNA for that particular marker, you'd only get the A dot lighting up and the B dot would be blank. I hope that got us there.

Q. As far as this testing that was — that you were performing at that point in time, you had talked about the concept of loci. If you can kind of describe what we're talking about with that.

A. I'm sorry. Again?

Q. Loci or Loci?

A. Oh, Loci. The six markers are called loci because they're located on a particular location on your DNA strand.

Q. And that's —

A. That's where the term loci comes from. Another term that's used is a marker.

[418] Q. Marker?

A. And we in this particular system had six markers. So for each marker you have a set of possible answers to it. And like I said, to give you a basic example, let's say the marker has two flavors A and B. Well, that means for that particular person, there's only three combinations that they could have, AA, BB, or AB. And you're — and you fall into one of the three. You don't fall into nothing, okay, unless the test doesn't work.

Q. Now, in this particular case, were you provided what was known as the known blood sample from the victim Cynthia Harrison?

A. Yes.

Q. And how did that come to you, into your possession?

A. It came in through an exhibit submission and it would have come in in this particular case, I believe it was a liquid blood sample. Left me check on that. If I might refer to the notes.

Yes, it was a liquid blood sample.

Q. Now, this would be something that's known. This is the blood sample of Cynthia Harrison?

A. This is the known standard from the victim.

Q. So did you test that, the particular number?

A. Yes, I did.

[419] Q. And did that provide you with the identifying markers for use in testing samples that may have unknown bloods on them?

A. Exactly. It's used as the basis to compare.

Q. Okay. So you then take — you have the known and then you take the unknown and then test that?

A. Actually, typically what we do for ethical purposes and for scientific purposes, we do the reverse. We test all the unknowns, determine the various profiles that they have, then do the knowns and see if anything matches up.

Q. Okay.

A. And that's what was done in this case.

Q. In this particular case, you were up there and there's gloves up there. Let's start first with State's Exhibit 36, which is the box cutter.

Do you recognize State's Exhibit — what's contained in State's Exhibit 36?

A. Okay. Is that the container?

Q. That's the container. Yeah, the container is basically —

A. Oh, okay. Yeah, it —

Q. Do you remember examining and basically swabbing suspected blood or suspected fluids off of the box cutter, Exhibit 36?

[420] A. Yes, I recognize this. It's got my case number and my initials on it, J.R. And the date that it was submitted. It's exhibit — our Exhibit 15. There's also a loose blade in here.

Q. And did you obtain — did you test – you tested those?

A. Correct.

Q. And did you come up with a, markers on that particular item?

A. I did. I got a six-marker match on some swabbings from the outside of the knife and also from one of the blades and they all came up with the same six-marker profile.

Q. And then did you also look at State's Exhibit 64 — no, excuse me, 54 right here?

A. Oh. okay. That's a pair of socks. My Exhibit Number 18. And once again, it contains my initials.

I'm sorry. I've got to find it here because it got opened a couple of times. Okay. Right up here is my initials when I first got it and then when I resealed the containers, I went ahead and put my initials on the seals.

Q. And so did you go ahead and again use the same process that you did with the box cutters?

A. Yeah.

Q. On State — on State's Exhibit 54?

[421] A. Yes, did I.

Q. And did you obtain a —

A. Yes, I got a six-marker profile on two areas of the white sock.

Q. Now, you then have a six-marker profile on Exhibit 36, on Exhibit 36, the box cutter, a six-marker profile on 54, the socks. Did you then compare them to the markers that you were able to obtain from a known blood sample of Cynthia Harrison?

A. Yes, I did.

Q. And did you come up with a conclusion and comparison?

A. It was a one-to-one match for each marker in the known sample from Cynthia Harrison and the unknown samples from the box cutter and the sock as an aggregate group.

All of them had exactly the same six markers.

Q. Now, can — as far as DNA is concerned, can it be — let's say if a blood sample or blood is deposited on an item such as pants, if you are — if you wash those items in a washing machine, what effect does it have to the DNA that may be left on those pants?

A. Well, the first thing it's going to do is dilute it. In fact, it may completely remove it in the washing process. It's possible.

[422] Q. And basically —

A. Because it's a surface — it's a surface attached to the clothe and so if you rub it hard enough and wash it hard enough, you can wash it away.

Q. I'm showing you State's Exhibit 55, which is a pair of tan pants. Do you recall working on these particular items or working on that particular item?

A. Let's see. Again, that's my exhibit — looking for my exhibit number.

Someone may have covered up the exhibit number on that. So excuse me just a second. Let me check the — yeah, it was my Exhibit 29. It came in in submission No. 7 and I did ask examine it for blood.

Q. Now, when you — when the items first come in, how do you inspect them initially?

A. Normally, I take them out of the container. They've already been swept by a sweeping technician, typically, and I'll take them out of the bag, put them on a piece of white paper and go basically over it by eye looking for red-brown stains.

Q. And did you detect any indications of red-brown stains on those pants?

A. I think there were some stains, if I recall, on this particular item somewhere around the — the cuff area, which looked like, you know, be of interest. They [423] were kind of brown stains, as I recall.

If you'll let me refer to the notes real quick. Yeah, the front and the back of the leg area and all exterior areas when I checked them for — with presumptive blood testing were negative.

Q. So you weren't able to recover any —

A. No.

Q. — type of fluid or bodily fluids?

A. There wasn't anything there that I could test, no.

MR. MOLCHAN: No other questions, Your Honor.

THE COURT: Mr. Doss.

MR. DOSS: Thank you, Judge.

CROSS-EXAMINATION

BY MR. DOSS:

Q. Afternoon, sir?

A. Am I going to need the gloves?

Q. Don't think so.

A. Okay.

Q. Not unless you just want them?

A. No, I just — just asking.

Q. Don't want to have to put them back on, right?

A. No, not gonna put them back on.

Q. Now, you looked at the inside of the shoes trying to — trying to see if you could find any blood on the [424] insides of the shoes, correct?

A. I believe I looked at both the exterior and the interior of the shoes. Let me look through there.

Some of the notes were incomplete so I may not have the — no, here we go. I've got right shoe and left shoe. Any particular — any particular one that you wanted?

Q. Both.

A. There were some — there were some dark brown stains on the inner sole of the left shoe if you're talking about the interior and I did not note any on the right shoe so I'm assuming that on the right shoe I didn't see any stains that were of interest on the interior.

Q. But you tested — you tested a stain and didn't come up with any indication for blood as far as the inside stain on that left shoe, correct?

A. The inside stain was negative, correct.

Q. And were you ever able to find any DNA whatsoever on those shoes to connect that to any particular individual?

A. No. None of the — none of the — none of the testing indicated the presence of blood, so there was no testing done for DNA on them.

Q. And at that time, was — was DNA advanced enough to be able to get the smaller samples that we get today to try to connect up to whoever was wearing the shoes?

[425] A. You mean was the technology sufficient?

Q. Right.

A. Yeah, it would have been if — at the time that I started doing DNA — it used to require almost a quarter-size bloodstain. At the time that I was doing this particular process, because of the amplification abilities, you could do stuff that was a pinpoint.

Q. Okay.

A. In fact, not even visible.

Q. And as far as — and as far as taking any kind of sample from inside the shoe to try to connect it to

whoever the wearer of the shoe was, was that possible at that time?

A. It probably would have been possible. It wasn't requested at the time to determine —

Q. That's not something you tried to do?

A. — to try to determine the owner of the shoe, no.

Q. So you never tried it?

A. I never tried it, no.

Q. And on the outside, it was negative for DNA but positive for blood on the left shoe, correct?

A. I believe — now, this was the left shoe?

Q. Yes, sir.

A. Yeah, there were several stains, dark brown [426] stains on the uppers, were positive for — for

phenolphthalein, yeah.

In other words, they were just nondescript bloodstains, possible blood.

Q. But you could never match that to anything?

A. No.

Q. And aren't there some — some false positives that can come up from things such as rust or bleach or certain vegetable materials?

A. Well, yeah. There are things that would, that would come up and that, you know, not yield results because they mimmick the presumptive things, like garlic and horseradish and things like that.

Q. You were unable to get anything from the pants whatsoever?

A. No.

Q. Even though they appeared to be pretty soiled at points, certain points on the legs?

A. They were not analyzed for DNA. Because they were negative for blood, they were not analyzed for DNA.

Q. Now, my recollection was, too, that you had been asked to see if you found any blood on Mr. Hurst's steering wheel cover. I believe that would be State's Exhibit 3. Do you recall that?

A. I recall it being on the list. Let me look [427] and see. Was that the blue vinyl steering wheel cover?

Q. That was State's Exhibit 3.

A. Sorry about the delay. It's voluminous notes. There were some brown stains, no obvious red-brown stains, and a general rub, which is just a blind sampling of it to see if there's a possibility anything was negative for blood.

Q. So no blood that you could find on the steering wheel cover?

A. Correct.

Q. The same thing with the brake pedal from Mr. Hurst's vehicle, State's Exhibit 16? No indication of blood there, right?

A. Yeah. Essentially the same thing. Faint brown stains but when I did a general rub and did a phenolphthalein test on it, it was negative for blood.

Q. And as far as — as far as anything you did, there was never any blood found in Mr. Hurst's car, to your knowledge?

A. If these came from Mr. Hurst's car, then those two items were negative for blood. I didn't do anything else, I think, except for a couple of pads or floor pads, floor mats from the car.

Q. And you had also received a blood sample from Mr. Hurst and fingernail scrapings?

[428] A. Yes. Correct.

Q. But you didn't find — you didn't find any — any evidence of value in your analysis of that, correct?

A. The fingernail scrapings were negative in DNA and the blood sample was positive and it was typed in order to determine what his six-marker profile was.

Q. And with the fingernail scrapings you're looking for trace evidence under those fingernails such as tissue and things of that nature that may connect up to the — to the victim in this case, Cynthia Harrison?

A. I was looking for tissue or blood or as you say, anything that might — that might have DNA on it that would possibly match up to the victim.

Q. And that evidence came back negative?

A. Yeah. Let me correct the earlier statement. I said the DNA was negative on the fingernail scrapings. They were negative for the presence of blood so no DNA testing was done.

Q. And you didn't find any tissue under the nails, correct?

A. Well, whatever was under there, like I said, was negative for — for the presence of blood, so it was left at that point.

MR. DOSS: No other questions, Judge.

MR. MOLCHAN: No other questions, Your Honor.

[429] THE COURT: All right. May he be excused?

MR. MOLCHAN: Yes, he can.

THE COURT: All right. Sir, you may step down and you are free to go.

THE WITNESS: Thank you.

THE COURT: All right. Members of the jury, I think we are bringing it to a close but I know we have at least one more witness. I think we have one more witness.

But since y'all have been here now for about an hour and a half, a little over that, let's just take about a five-minute break and let them stretch their legs. All right? If you'll just step out, we'll bring you right back in.

(Jury out)

(Recess)

THE COURT: All right. You folks ready?

MR. MOLCHAN: Yes, ma'am.

MR. DOSS: Yes.

THE COURT: All right. Then let's bring in the jury.

(Jury present)

SECURITY OFFICER: Jury's in the box, Your Honor.

THE COURT: Let the record so reflect. [430] Everyone, please be seated. Mr. Molchan, call your witness.

MR. MOLCHAN: We call Dr. Michael Berkland.

THE COURT: All right, sir. You have been previously placed under oath. You are still under oath.

WHEREUPON, MICHAEL BERKLAND,
having been recalled to the stand, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MOLCHAN:

Q. Now, Dr. Berkland, we didn't get into this part in your original testimony. You had indicated at some point in time that you had been a medical examiner. Medical examiner and then the term forensic pathologist tends to come into play. Could you kind of describe what a forensic pathologist is?

A. Sure. A forensic pathologist is a pathologist that's gone through traditional training, medical school and then anywhere from three years to five years of a residency program. I did a combined fellowship in anatomic and clinical pathology and then has additional training in forensics. Either in a one-year fellowship or two years full time experience and then they sit for an exam by the American Board of Pathology.

[431] And so I'm triple board certified in anatomic pathology, clinical pathology, and forensic pathology.

Q. Now, could you describe basically your educational background?

A. Sure. Regular undergraduate degree in science at the University of Missouri. I worked on a masters for a while then got accepted to medical school. Following that was on the health professional scholarship program and was picked up by the military and was transplanted to Brooke Army Medical Center in

San Antonio, Texas was where I did a clinical internship, rotational and then my four years of residency in anatomic and clinical pathology.

And then following that I was chief of pathology in aerial lab services at Munson Army Community Hospital up at Fort Leavenworth. At that same time I was a deputy regional medical examiner for the Armed Forces Institute of Pathology where they would fly me out to cases for fly cases into me and then I took up some time working up there in Kansas City as the acting chief medical examiner until I came down here to Florida in 1997 as the deputy.

Q. Now, in your career, approximately how many autopsies have you performed?

A. Over four or 5,000.

Q. And what is the basic purpose of the autopsy?

A. The autopsy has several purposes. First and [] **[432]** foremost is to establish the cause and manner of death. Everybody that dies dies for a particular reason and then we classify that into one of five potential manners of death and by that I mean accident, suicide, homicide, natural, or if we can't absolutely within reasonable scientific certainty place it in one of those categories, we're obligated to use the term undetermined, which means something very specific to a forensic pathologist because we can't within scientific practices put it in one of the other categories.

It doesn't mean at some later point that we can't place it in another category when we obtain more investigative information, stuff like that, but it's kind of a bookkeeping procedure, if you would, for that particular category. Those — that's the main purpose that a

medical examiner performs is cause and manner of death.

Some of the secondary issues are time of death determinations, amount of disability, injury patterns, how they can be inflicted, things like that that result in back to the crime scene that we talked about earlier to where you make, you know, observations at the crime scene, correlate them back with injury patterns you see on the body and then the whole thing makes sense and you're able to tie it together in one big picture.

Q. And basically in your first portion where you [433] talked about — you talked about what you found at the crime scene and what you observed. And that would be pertinent in expressing your opinion regarding the autopsy findings or what you believe is pertinent?

A. Oh, it's very pertinent.

Q. Okay. Now, you said you have kind of started the autopsy at the Popeye's?

A. Correct.

Q. And I think you talked about how the body was, you started with clothing and things like that?

A. Correct.

Q. Where was the — ultimately where was the body taken?

A. Following the initial removing of the clothing on a sterile sheet right there at Popeye's to preserve all the evidence for any trace collection and to save the clothes, the patterns that were on the clothes and the injuries to the clothes, following removal of all that the body was transported to Sacred Heart Hospital to the

ME's office there where a formal autopsy was completed there.

Q. Now, at that autopsy, is part of that aspect the — did you weigh and measure the body of Cynthia Harrison?

A. Yes.

Q. How tall was she?

[434] A. The decedent's body measured 56-and-a-half inches and weighed approximately 86 pounds.

Q. Now, 56-and-a-half inches, how tall is that as far as feet?

A. Just under five feet.

Q. Four foot eight and a half inches?

A. Yes.

Q. And 86 pounds?

A. Yes.

Q. Okay. Now, when the body is brought, could you describe the process that you go through as far as the autopsy is concerned from exterior to interior —

A. Sure.

Q. — of the body?

A. We always start off with photographing the body. In this case the body was extensively photographed actually at the scene while we did the first phase of the autopsy, if you would, removal of the clothing and stuff.

Subsequently, when the body was taken back to the morgue, we did a special light exam on the body looking for other trace materials and things like that.

The body is then photographed again, cleaned up and then each individual injury is documented and identified and photographed. And so sometimes the external exam can be a very short exam; sometimes when there's a lot [435] of injuries, it can be a very long, detailed exam.

And then following that, we actually get into the internal process of doing the exam.

Q. Now, on — as far as the exterior of the body of Ms. Cynthia Harrison, what wounds did you find on her body predominantly?

A. There was in excess of 60 plus incised wounds, in other words, wounds made with a sharp-edged instrument. Some of them were of the — what we call a slash-type where the length of the wound is longer than the depth and others are characteristically what we refer to as stab wounds where the depth is fixed in terms of it's not a long cut, it's just a short stab wound like you would with a traditional knife.

Q. Now, you observed or saw the box cutter at the scene of this particular crime?

A. Yes, I did.

Q. Is the box cutter that you found and that was recovered and is in evidence as State's Exhibit 36, consistent with having inflicted the wounds on Cynthia Harrison' body?

A. Yes, both types.

Q. Okay. And, now, as far as these wounds, were any of these wounds inflicted after Ms. Harrison had legally died?

[436] A. When we — when we categorize injuries, we term them antemortem while there's a bleeding

heart, perimortem, right around where the heart is starting to fail, and then clearly those that are inflicted after the heart has ceased beating where we don't have a vital reaction from the vessels that were violated by whatever the injury is for blood to leak out in those areas because there's no driving force. The pump is not working anymore, if you would.

There was no true postmortem injuries on Cynthia Harrison' body. There was a couple of injuries, a couple of the stab wounds that had very little bleeding in them that I would probably categorize as perimortem at best. But everything else was clearly an antemortem injury.

Q. Were any of the 60 plus wounds that she suffered instantaneously fatal when inflicted?

A. No.

Q. And why is that?

A. Well, most of the injuries were slashing-type wounds to a variety of places on the body, the chest, the back, the head, the face, and those that didn't hit any major structures would not have been, you know, immediately fatal.

Certainly they would represent a source of blood loss, if that wasn't taken care of. There was several injuries that I would refer to as the ability to be fatal [437] injuries and it's hard to know, because you'd have to sequence which ones occurred first, which is something that we try to do if at all possible, but there was a large wound to the neck that actually severed the trachea, which is your air pipe.

That coupled with the fact that some major vessels were also cut in the neck, would allow blood to go down the airway into your lungs, in terms of aspiration of blood, which she did have some evidence of on our in-

ternal exam. So that's one of the injuries that could be immediately fatal. And by immediately I don't mean instantaneous death but it would have promptly led to things progressing.

Another major injury was the — she had an incised wound to her wrist that cut the left radial artery or where you take your pulse at normally. That's an arterial structure and with every beat of the heart, you're losing a certain volume of blood. So that would lead to a more rapid progression of death from exsanguination.

And along with the neck cut as well, there was also the jugular was cut, which allows air from the outside to get down into that vein and go and cause what we call an air embolus in the heart, which would be more of a rapid event, which on x-ray I didn't see any evidence that that [438] took place, but it's something that has to be considered when you violate that structure and have it exposed to open air.

And she also had a large chest wound that resulted in what we call a pneumothorax where the depth of the blade on several cuts had gone down and violated the plural space and there was actually a stab wound down into the underlying lung, which would allow free communication of the lung with the plural space with the external air, which would collapse that lung and cause a lot of respiratory difficulty.

Q. Now, as far as — you had talked about the arterial cut on the arm. When that is cut in the manner that you saw, have you seen in your over 4,000 autopsies a number of scene pictures, what happens to the blood as the heart continues to pump from that?

A. Assuming that the area is free to be exposed to the surrounding environment, it yields what we call an

arterial spurt pattern, which is a projected blood pattern that comes out under force with a large volume of blood as opposed to simply cutting your finger and it dripping down and dropping blood.

This blood comes out with force because it's on the arterial side of the system.

Q. And did you see evidence of that at the scene?

[439] A. Yes.

Q. Now, as far as the tape, can you describe the taping of Ms. Harrison?

A. There was — there was what appeared to be like electrical tape around the face and there was also — the hands were bound behind the back with the same electrical tape and that tape did not have a cut on it. From the cut, that would have incised the artery in the wrist, which was one of the things that kind of allows us to sort of sequence things a little bit, which came first, the binding of the wrist or the incised wound to the wrist? In this case there was no cut to the tape in the same area where we would, you know, have expected if you had — it would not make sense to make an arterial cut and then bind the wrist is what I'm trying to say. The binding occurred first and then the cut was second and it didn't violate the tape.

Q. The same with the tape on the face?

A. Correct.

Q. Same? No cuts and — or do you remember?

A. I think there was a cut on one side of it. There was a number of facial cuts that were quite deep all the way down to underlying bone in some areas and I believe that the facial tape was — did have some cuts on it.

Q. I think that the photos indicate that?

[440] A. Yes.

Q. Now — now, you indicated that — but a number of these wounds would — would any of those wounds in and of themselves be fatal or would there be several of them that potentially —

A. The ones I talked —

Q. Let's go through the main ones that you found.

A. Sure. The incised wound to the neck actually it has two different mechanisms that could have resulted in death. One is the cut jugular vein allowing air into that vessel going down into the heart and becoming what we call an air embolus. That's one mechanism.

The second is the nearly complete transection of the trachea, basically exposing it to any blood that's in the area allowing blood to go straight down into your airway and out into your lungs. And obviously if there's blood in the alveolar spaces and not air, you're not going to get a good oxygen exchange at all. And so your lungs fill up with your own blood basically. So those are two ways just from the same injury up in the neck.

There was an incised wound across the chest and that violated all the way down to the plural space with a stab wound on the lung. And so that would cause the pneumothorax, which would collapse one half of your lung. You would still have the right side that would be functional [441] but it's got blood coming down into it from the cut airway. So you've got a very compromised system.

And then the last is the cut artery in the wrist, which would cause the arterial spurt pattern with every beat of the heart.

Q. Now, how long, in your opinion, would she have survived after these types of wounds were inflicted?

A. Once again, it's somewhat variable. You need to — you know, to be as precise as possible, you need to know the sequence that they occurred in in order to sort of time how far you could go.

In other words, if the process that she died was exsanguination, then obviously the one that caused the most amount of bleeding first would, you know, occur earlier and give you more of a time lag. With all of these wounds occurring in a fairly short order and by that I mean when we — when we look at how long a person could survive one of the things we always start with is a — we try to do a time of death determination or at least when the injuries could have occurred.

In this case, we had a very narrow window of when the injuries occurred based on historical information of when she was on the phone and when somebody came to the back door, kind of thing. So a very narrow time frame of like 15, 20 minutes, I think. So death could have occurred **[442]** in as little as 15 minutes or even less. I think 15 minutes is probably stretching it considering the marked amount of injuries, but once again, if the injuries weren't all inflicted within a minute or two and some were done in the first three or four minutes, some were done in the second three or four minutes, some were done — then obviously our timeframe lengthens out just a little bit.

But I — you know, I think it would have been relatively rapid.

MR. MOLCHAN: I'd like to approach the witness, Your Honor.

THE COURT: You may.

Q. (By Mr. Molchan) I'm showing you what's marked as State's Exhibits 25, 27, 26, 29, and 30.

First of all, could you look at those, Doctor, and would those photographs aid and assist you in explaining the types of injuries that were — that were done on Ms. Harrison?

A. Yes.

MR. MOLCHAN: Let me show Mr. Doss those first.

(Discussion off the record between counsel)

MR. DOSS: Judge, can we approach?

THE COURT: Do you need the court reporter?

MR. DOSS: Yes.

[443] (At the bench:

THE COURT: Okay.

MR. DOSS: Judge, I want to renew the objection I had already made. I'll make the same objection to State's Exhibit 25, State's Exhibit 27 — those are the two, 25 and 27.

This has already been explained. We've already got some extremely gruesome photos in and this is more gruesome photos. It's just adding to inflame the passion of the jury. It doesn't have any direct relevance. Obviously, over and over again. He's testified to that. I'm not disputing that. I'm not challenging the cause of death. I'm not — I'm not challenging the manner of death. I'm not challenging any of that and I'm

not going to open the door to it, I can assure you of that.

MR. MOLCHAN: I have to prove my aggravating factor of heinous, atrocious, and cruel beyond a reasonable doubt. The doctor has indicated that these wounds that were inflicted upon her were done while she was alive and, quite frankly, these pictures are — he can talk about them all they want but, you know, and I hate using them, too, but unfortunately, the picture is worth a thousand of Dr. Berkland's words in this situation, especially when it comes to heinous, [444] atrocious, and cruel.

THE COURT: Anything further?

MR. DOSS: No. The only thing is while we're here, Judge, I just want to make sure that I renew my objection as to the not being able to impeach him with what you've already ruled on. I just don't want us to have another side bar but I don't want to waive it so I'm going to renew that objection as well. But I don't have any further argument as to these.

THE COURT: Okay. I'll take it two steps. The first is these pictures to which Mr. Doss has objected, they are gruesome photos but Mr. Molchan has raised an excellent point. He bears the burden and these clearly correlate to wounds that the doctor has testified to. But the doctor's testimony is very sterile and these clearly show the actual event.

So I do find that they are more probative than prejudicial. Second of all, would be the renewal and — the renewal of the objection as to the specific acts of misconduct.

Again, first of all, I believe that the case law is that you don't get into that unless it is an issue that is di-

rectly pertaining to something about which he has testified. That was never presented to me. And I went and again read the case of Davis versus [445] Alaska.

I think that's distinguished. Even though you renewed it, my ruling will stand.

MR. DOSS: Okay.

(Bench conference concluded)

MR. MOLCHAN: I need to set up the screen.

THE COURT: Are you going to want the Doctor off the stand?

MR. MOLCHAN: Yes.

Q. (By Mr. Molchan) Now, Doctor, first, before I start using the photographs, the injuries that we're going to show to the jury, were they inflicted based on your examination being at the crime scene while Ms. Harrison was clothed?

A. Yes, sir.

Q. So the depths and these wounds were done through clothing?

A. Yes. With the exception of that where the clothing had already been violated and there was already a hole in the clothing.

Q. I'm going to first start with State's Exhibit 26.

Can you orient yourself or maybe —

A. Yes.

Q. Can you talk about State's Exhibit 26 first of [446] all?

A. Sure. That's the — that's the, Cynthia Harrison's left wrist. It's down right above the wrist area,

right about here on me and it's an incised wound that starts off deep at one aspect and then trails off more shallow. So it's a longer wound than that initial main part.

Q. Now there's another like wound on top of that. Can you amplify on that?

A. Right there?

Q. Uh-huh.

A. There's a couple of little wounds right there. They're just small, little incised wounds. They had no significant depth to them on those particular wounds.

Q. Now, how would that type of injury be made? Or could that injury type be made with the box cutter type of —

A. It can. It can be made with the very tip of the box cutter. If you look at a traditional box cutter it's got the blade coming out, you can utilize that as a jabbing instrument. And the depth will be related to how far down in the blade is allowed to go. The further it's allowed to go, the longer it appears on the external surface. But the wound depth itself will always have a maximal depth of whatever the depth of the blade guard is **[447]** when you've got the blade out.

So in this case, based on the depth of the numerous stab wounds that were on the chest and the back, the length was all about three quarters of an inch and the depth was about 12, 13 sixteenths of an inch, which corresponds to what the knife would be when it was extended out.

Q. That being the box cutter knife?

A. Correct.

Q. Showing you State's Exhibit 29.

A. That's the left wrist of Cynthia Harrison where it's slightly gaping open a little bit. It's a full thickness cut that goes across and it takes out a number of the — what we call the flexor tendons allowing to you flex your wrist and stuff and it also hits the radial artery. It doesn't completely sever it. It's nearly completely severed but the fact that it didn't, that allows it to in essence stay open and not retract and close back up like a rubber band if you cut in the center, it would snap back and retract back up into wherever it was. This stayed open so the lumen was exposed for a pattern.

Q. Would this have been, the two wounds on State's Exhibit 26 and then, in the exhibit, would those have been painful?

A. Yes.

[448] Q. I'll show State's Exhibit No. 30. And if you can amplify the injuries that you — talk about the injuries to the back.

A. Sure. You can see a number of injuries to the back here. This is the — the longest one here, it starts off relatively shallow and gets deeper as it goes to the bottom and there's a little trail off here. There's a superficial kind of like, you know, incised wound to the right side as well. And then there's three stab wounds that all have almost identical lengths and depth. And when corresponding back to the box cutter, utility knife, those would be very consistent with poking injuries from the blade alone.

This particular wound at the scene actually still had the shirt embedded in the wound from the cut itself and that's why we wanted to retrieve all of that evidence

before it had a chance — before the body went into a body bag and everything got contaminated.

And up here on the back of the head, there's incised wounds all along the back of the neck. Some of them are pretty deep but there's multiple incised wounds all over the back of the head as well.

Q. Now, the wounds to the back of the head, would those have been fatal in and of themselves? Did they penetrate the skull?

[449] A. No, they did not. They just went down into what we call the dermis, subcutaneous tissue and some of the muscle attachments. But in and of themselves, they would not have been fatal unless they were allowed to just bleed over a long period of time.

But no major arteries were severed or anything back in that location. So it would have just been constant draining and oozing but the scalp is a very vascular structure but not as vascular as an artery.

Q. Again, that would have been painful, also?

A. Yes.

Q. State's Exhibit 25. Again, if you could describe?

A. State's 25 has a number of injuries. We'll start with the head and face region first. There's an incised wound over on the left side of the head. There's also some on the right side. And all of these are incised wounds, some of them going through the eyelid region and some of these are down to the underlying bone of the face itself. Cuts through the top of the lip, all the way down to the underlying bone and gum.

Some of cuts, intersecting cuts become a little problematic when you start to try to count, categorize each one of them.

The large incised wound that extended **[450]** basically on down into the neck region and the trachea is cut right here in the midline and the jugular over on this side, which would have been an abundant source of venous blood. Everything that was up in the head area would have drained out and had nowhere to drain back down to so it would have came out of this opening.

The trachea is right there so it allows all that blood to go down into the open trachea and start filling the lungs up with blood and, of course, your normal respiration efforts brings in, you know, air and whatever else is there. So if you swallow wrong, you bring that down, too, and stuff. So in this case, she was bringing blood down into her lungs.

We have a got a number of short incised wounds here that are superficial, some intersect each other. This one's got a cut going through the top of it like that that extends on down. If you re-approximated this, it would actually be several cuts, one going across like this and then the larger one that goes down like that and that kind of splits it apart there.

But the biggest injury here is the one to the center of the chest that goes over on the left side. It's — it's cut on top of a cut with **[451]** a stab wound basically. It starts up here, continues on down and then there's a secondary cut and then right about here is a puncture mark, stab wound from the tip of the blade that actually hits the underlying lung and that's what causes that lung then to collapse and let air pressure equalize. So that collapses the lung on that side.

Q. Now, these wounds to the top portion of her face across the eye, across the top of the skull, these places, would those have been — while they may have been — would you agree they're painful?

A. Yes.

Q. Would they have been fatal?

A. No, not immediately fatal. It would have taken — once again, the mechanism of death from all of these injuries would have been blood loss and it would have taken place over a time period. It's nothing that you would sustained the cut and immediately have bled out kind of thing. It would have been in time.

Q. And again, a couple of these wounds in this direction are of the type — will you talk about the poking?

A. This one right here and this one right here are the more consistent with just the blade being used as a stabbing instrument.

Q. State's Exhibit 27. This would go more to the right side of the face.

A. Once again, you can see the facial incised [452] wounds up above the eye extending on down to the top of the lid, corner of the mouth. And then you've got everything from in front of the ears going right down to the underlying bone and subcutaneous tissue and incised wound on top of one and then a larger one that basically connects up and transects the trachea.

Q. And again, these — which one of these would have been particularly fatal?

A. None of these would have been particularly fatal. This one up here would have been just as deep down here that would have taken out the jugular on

that side, but in this particular case, it's up higher than that.

Q. But it didn't hit the jugular?

A. Right. None of the arteries were hit up here so we only had one source of arterial bleeding and that was the wrist.

Q. Now, at the scene were there certain photographers at that particular scene location that would aid — basically aid you in also the analyzation or your analysis of the death of Ms. Cynthia Harrison?

A. Yes.

(Discussion off the record between counsel)

MR. DOSS: This will be subject to the previous objections, Judge.

THE COURT: So noted.

[453] MR. MOLCHAN: If I could ask him to step down again. Hold up 35. This is State's Exhibit 35-A through M.

Q. (By Mr. Molchan) Now in State's Exhibit 35, in that photograph, what do you know, specifically talking about the water and the blood, or what did you see on 35-A?

A. 35-A looks like it's where the shelving was inside the refrigerator unit and you can see we've got water and stuff that's under here. Part of the thing that complicated the total reconstruction is that there was evidence that there had been a clean up. That stuff that shouldn't have been wet was wet down and we subsequently found back in the mop area a mop that had red-brown stains on it and it tested positive for blood. And so that kind of helped explain a lot of the

water that we were seeing. You see this is a — this is all damp here and then in B.

At this point the yellow sticks are out and we're mapping various areas of the blood that's on the door in terms of contact stains and you can see when you get down to C, that this is after the door has been taken off its hinge to preserve it. This is actually the inside of the door and you can see there's contact stains and blood where something bloody has come in contact with the door itself.

Q. Then D, please?

A. Yeah, in D you can see once again the door has [454] been opened up. You can see the same sort of detail that is depicted in C.

This is the entryway into the freezer compartment. You can see there's a lot of dropped blood and blood staining on the white tubs that are in front of it. And you can see the clothing apparel, the tie of the uniform that was right in the doorway.

Q. Now, in D, E, and F there's clearly blood on the way to where Ms. Harrison was found. What does the — what is significant about having — or seeing blood at that location?

A. This clearly tells us that the body was already bleeding outside, at least in the refrigerator area at the very least prior to being back into the freezer compartment. This is what we call a cast off bloodstain pattern here where something is bloody and it's moving and blood is coming off of —

MR. DOSS: Judge, I object to any conclusions on that. He hasn't been qualified —

MR. MOLCHAN: That's fine Judge.

MR. DOSS: — as a bloodstain expert.

THE COURT: Sustained.

Q. (By Mr. Molchan) Now, you see that in photo G and H?

A. Correct.

[455] Q. Now, in addition, just to be clear, in H there's the photo of the pants and you see blood on her knee; is that correct?

A. Correct.

Q. Okay.

A. Blood on both knees.

Q. Both knees was found?

A. And it actually is riding up slightly higher than her knee caps would be but when you would put her down in a more traditional position, her pants drop back down to normal, then it puts it right at the level of where you would kneel and have blood on your knees then.

Q. Now, is there any — on this exhibit, is there any indications of what you've described as arterial spurting?

A. Yes.

Q. And where would that be?

A. That's in No. 13. This is on the back wall. You can see the yellow stick and marker No. 13 up there. This is a large volume of blood. You can see it a little bit better in K where it's got the entire pattern all the way across here.

All of that is a large amount of projected blood coming out under force from the arterial pressure that your

heart generates and that's the typical arterial spurt [456] pattern that you can see.

Q. And then I guess these other photographs are just areas of this blood right where the box cutter is?

A. L and M shows much better than the previous one photo that you showed. It shows the red-brown stain right in front of the box cutter that was actually still wet when we got there.

Q. And was the box cutter open like that when you found it?

A. Yes, it was.

Q. And as far as the cause and manner of death, what did you conclude with respect to this?

A. I ruled the cause of death of Cynthia Harrison as complications of multiple incised wounds for the reasons I already told you regarding four possible different mechanisms all interplaying with each other in a fairly short time frame.

It's hard to ascribe, you know, what caused 25 percent of the death, what caused 30 percent, stuff like that. So in this case, you know, it's easier just to list it for classification purposes as complications of those various wounds with obviously referring to the four fatal ones.

MR. MOLCHAN: No other questions, Judge.

THE COURT: Mr. Doss.

[457] MR. DOSS: May we approach, Judge?

THE COURT: Sure.

(At the bench:

MR. DOSS: Judge, I have waited to the conclusion of Mr. Molchan's cross, I didn't want to interrupt, but Judge, I think to preserve something that happened, I need to move for a mistrial because the family members that had got up during the photos that I had objected to made the big commotion in leaving.

The lady was, who fell down outside and the deputies rushed out there, the jury's focus was on that commotion and they're naturally being upset. I don't blame them for being upset but I think that — I think that it's really tainted the jury.

I watched them watch her run out, even though Mr. Molchan was still asking a question.

MR. MOLCHAN: I didn't really see what was happening, Judge. I just — my attention was elsewhere. I heard just, you know, something, but I can't speak to it. It didn't seem to me — while it certainly is unfortunate but it was not, I don't think, to a level that would necessitate a mistrial.

THE COURT: Okay. I did see the whole thing from start to finish. I don't know who the people are. [458] I presume they are very close family or very close friends of Ms. Harrison's. One of the elderly ladies, and I don't know I'm guessing, maybe it was the mother.

MR. MOLCHAN: Mother.

THE COURT: Is it the mother? During the presentation of the photos of the injuries she got up and actually started walking out of the courtroom and she was doing so rather unobtrusively. About probably two thirds of the way out, though, she started to — and I don't know whether — whether she was becoming ill or whether she was just losing her balance. I couldn't tell which of the two, but she was noticeably in distress.

She made it about, I guess, the last ten feet or so and then she got to the door and quite frankly from my angle, I couldn't see whether she fell or whether they caught her or whatever but there was a situation where the sheriff's deputy did get up and move to aid her out the door.

One of the other family members at that time, I presume again family members, got up and went outside rather quickly to make sure that — well, it appeared and I'm assuming, to make sure that the mother was okay.

There's no doubt that the jury saw it but I [459] don't believe at this time that it rises to the level of a mistrial. I think it's clear to all that the folks that are sitting behind Mr. Molchan's desk in the gallery are, like I said, either family members or close friends of Ms. Harrison's and the pictures are horrific. There's no doubt. I'm not sure that was something that anyone would particularly like to see a loved one.

So while there was a commotion, I don't think it was particularly demonstrative. Under the circumstances, it was as unobtrusive as that type of situation could be. I think the mother tried very hard not to draw attention to herself but she did under the circumstances.

But again, I don't think it rose to the level of a mistrial, particularly under the circumstances. So motion for mistrial denied.

MR. DOSS: Judge, are you going to just note that it was State's Exhibit 25 whenever it happened? That's all. I'm not arguing your ruling, I just wanted to make sure it was State's Exhibit 25.

THE COURT: Is that the one from the face-on the picture?

MR. MOLCHAN: I think so.

MR. DOSS: Yeah.

[460] THE COURT: Then that would be the one that it was.

MR. DOSS: Yeah. Okay.

(Bench conference concluded)

CROSS-EXAMINATION

BY MR. DOSS:

Q. Good afternoon, Dr. Berkland.

A. Good afternoon.

Q. Sometimes in your duties as a medical examiner, you're asked to narrow down the time of death, right?

A. Yes.

Q. This wasn't one of those cases where you had to do that, was it?

A. We had a very small, narrow time window that we were dealing with.

Q. Because you knew she was on the — you knew she was on the phone with somebody at 7:55, another person?

A. Correct.

Q. At 7:55, right? And then the window extended out to about 8:15 — 8:05, 8:15?

A. 8:10, 8:15 I think is what I had in our intake report for the ME's office.

Q. And there's no way you're going narrow it more than that kind of time frame, right?

[461] A. No.

Q. You just don't have the technological capabilities of doing that, right?

A. There's no what we could call early postmortem indicator that's going to allow us to make a distinction between one minute and 15 minutes after death.

Q. But if you didn't have that, you might have tried to narrow down the time of death but with something like this, you didn't have to narrow it because of that small window, right?

A. If we had a much larger time window, we certainly would have looked at some things. In this case, it would have been somewhat complicated by the fact that one of the things that we would look for obviously is body temperature and since she was placed in a freezer in a cooler compartment for which we did not know the temperature of, that would have caused problems because by the time we got there, the doors had been opened for a while so the ambient temperature isn't the real temperature of the freezer.

Q. I think you had come to the opinion before that it would have taken around a minute or so to inflict these wounds?

A. Yes, on the low side. On the low side.

Q. Okay. And the reason that this scene is as [462] bloody as it is is because of all of that arterial spurting and the particular wounds? These are wounds that lend themselves to making the scene be a very bloody scene?

A. Yeah, the arterial spurt pattern, the only place it was identified was back in the freezer compartment area. Where it was prior to that, if it was prior to that, has been somewhat destroyed by the cleanup efforts of the water.

I certainly believe there was bleeding outside of that area based on where I found the water, but the nature of that blood that was there may have been dropped blood from some of the stab wounds —

Q. You have no way of knowing, right?

A. We have no way of knowing.

Q. And this would have happened relatively quickly as far as the body bleeding out so to speak because you've got wounds there that there's really no bleeding?

A. There's two wounds that are — that are relatively devoid of blood. Those are the last two stab wounds. And at that point, the body may have already been failing in terms of the pump running out of things to — blood to circulate around.

MR. DOSS: No other questions, Judge.

MR. MOLCHAN: No other questions, Judge.

THE COURT: May he be excused?

[463] MR. MOLCHAN: Yes, he can.

THE COURT: All right. Thank you, Doctor.

THE WITNESS: Thank you.

THE COURT: Mr. Molchan?

MR. MOLCHAN: Judge, other than an issue with the victim impact, which we can — will be very short

type of thing, basically we've concluded our presentation of evidence.

THE COURT: All right. So is this a good time for me to excuse the jury?

MR. MOLCHAN: I think so, Your Honor.

THE COURT: All right. Members of the jury, thank you so much for your attention. Tomorrow I remind you is going to be our long day because we have witness problems. So we're not going to start in the morning until 10:00 because if we went from 9:00 to 7:00 I think y'all would — it would be too difficult for you folks.

So we're going to start at 10:00. So if you would be here at 9:45, then we'll go — again, we anticipate that that witness will start testifying somewhere around 4:30ish, depending upon the trial. And we and anticipate that it will go for about two hours.

So plan on tomorrow something around 7:00 – 7 **[464]** o'clock, something like that. All right. Thank you. Just leave your pads. We'll take care of them. See you in the morning.

(Jury out)

THE COURT: Mr. Doss — Mr. Doss, let me ask you a question. When Mr. Molchan was holding up the tri-board with the pictures on it, you said you renewed your objection?

MR. DOSS: That's correct.

THE COURT: I don't remember you objecting to the tri-board.

MR. DOSS: I did, Judge, only because there's the two photos that I objected to.

MR. MOLCHAN: There's two correlating photos that had already been brought in.

THE COURT: Oh, all right.

MR. DOSS: He's got it as 35-A through M but I want to say it was 23 and 24, maybe, I forget the exact number. They were on there, that's why I felt I had to renew it, because those photos were on there. I didn't object to any of the other photos.

THE COURT: That's fine.

MR. DOSS: That's why I did it.

THE COURT: I was unaware that the two were on that board because I had not seen what's on that board.

[465] So okay. If they were the two that we previously dealt with, then my ruling stands.

MR. DOSS: And again it was just to avoid any waiver, Judge.

THE COURT: That's fine. Not a problem. All right. Anything we need to take up tonight?

Then I'll see y'all at 8:45.

MR. MOLCHAN: Can we basically leave things in place or how do we going to go about it?

THE CLERK: I'm going to have to put the exhibits in the room back there.

THE COURT: Mr. Molchan, I will obviously because of the concern that Mr. Doss raised at the bench, I don't know if you have any exposure to those folks sitting behind you.

MR. MOLCHAN: Judge, just for the record purposes, our victim advocate had met with them. We had

already explained to excuse themselves. We had told them when they were going to be coming.

I think it's just one of those things. We cautioned them that, really when that was coming up not to even be in the courtroom. They chose to. And they were told specifically not to have any outbursts and that's why I imagine they were in the process of leaving.

[466] I can certainly deal with that again in the morning.

THE COURT: Please, because clearly, I don't want any difficulties.

MR. MOLCHAN: No, ma'am. I understand.

THE COURT: Okay. Thank you, sir.

(Discussion off the record at the bench between security and the Court)

THE COURT: Mr. Molchan, they are outside still.

MR. MOLCHAN: Okay.

THE COURT: Certainly it's a public proceeding. They're welcome to come in unless I, in any way, shape, or form, perceive that it's going to happen again.

MR. MOLCHAN: Right.

THE COURT: So if you could. Because they're wanting to know a time for tomorrow. So I just want them to know.

(bench conference off the record between security and the Court)

SECURITY OFFICER: So starting at 10:00?

MR. MOLCHAN: Is that what they're wanting to know?

SECURITY OFFICER: Yeah. I wanted to make [467] sure.

MR. MOLCHAN: I will. We'll have plenty of time to meet with them.

THE COURT: All right. Thank you. We're off.

(Conclusion of proceedings held 3/6/12)

[468] (Proceedings held 3/7/12)

THE COURT: I have something to take up before we go forward, but I don't know if you folks do as well because you both look like you're sitting at ready.

MR. DOSS: We're ready to get started and we have a couple of issues for you, Judge, but we can take them in order that you say.

THE COURT: Okay. I just wanted — are you intending on offering victim impact?

MR. MOLCHAN: Yes, ma'am.

(At the bench:

THE COURT: I took my book home last night to look at it and, of course, it is — although it is certainly allowed in Florida, it is discouraged. Have you had an opportunity for go over what is allowed and what is not allowed with your particular witnesses?

MR. MOLCHAN: Judge, basically I have a prepared statement that is written already.

Mr. Doss has read through that. He has one particular objection and that's what we wanted to talk about, but it's already written and we — that's why I do it because, in essence, it's there to be read.

THE COURT: Okay.

MR. MOLCHAN: If you want to look at it at this time.

[469] THE COURT: Let me review it, and I will get with the court reporter. If you will tell me what you believe is the part — we're off the record.

(A discussion was held off the record.)

THE COURT: Back on the record.

MR. DOSS: By implication, I believe that implies or infers that that's what happened here. I don't think that is permissible. There has been nothing presented that permits that. I think — otherwise, I think that it's — I think it's fine. I think it comports with, I believe, the Supreme Court cases of both Booth and Payne, and that whole line of cases. I believe the rest of it complies. I don't think that does, and I will just object to that particular portion.

THE COURT: All right. I'm not — of course, I'm only speculating on what she means, but I would agree with you. And I'm going to hear from you, Mr. Molchan, but I agree with you to the extent that it's not implying. I think she is saying that's what she did under the circumstances with Mr. Hurst because it says, Cindy gave him what he wanted.

So, Mr. Molchan.

MR. MOLCHAN: Whatever the Court, is fine. I'm fine with it. I can just take that part out.

[470] THE COURT: I think so.

MR. MOLCHAN: I'll start with — it says, "There is one particular person at the funeral that stands out to me," and delete the rest of that.

THE COURT: Well, I'm not sure that the rest should go out.

MR. MOLCHAN: Which part — just because it's out of context, I think that —

THE COURT: I think the last paragraph is fine.

MR. MOLCHAN: Yeah, the last paragraph.

THE COURT: Here, you can — I think it goes — stops there, but I think that one is fine, the last paragraph.

MR. DOSS: Oh, absolutely. I think we ended "at wanted," before it starts — where it says, "The picture." "Wanted" would be the last stricken word.

THE COURT: Well —

MR. MOLCHAN: Yeah.

THE COURT: I don't understand what the picture shows.

MR. MOLCHAN: This, Judge. This is the picture.

THE COURT: Oh, okay. I didn't — didn't know that's what she was referring to, other than that one [471] part, I think it's fine.

MR. DOSS: Judge, I guess two other things. I had mentioned to you yesterday in regards to funds regarding Dr. Taub and regarding the investigator that I have. I have motions and orders here. I realize I didn't copy them, so I need to get copies, and I will provide them after — after lunch. I can give you the orders now, Judge, and I will give you the motion. And what I will do is I'll copy it and —

THE COURT: I can have the clerk call for copies.

MR. DOSS: That will be excellent.

THE COURT: No problem.

MR. DOSS: And I have two other things.

THE COURT: Although, I'm not sure at this point the under sealed part is necessary.

MR. DOSS: That's me in a hurry, Judge.

THE COURT: That's okay.

MR. DOSS: I told Mr. Molchan that's what I was giving you. I think I mentioned it in front of him.

THE COURT: Let me look at it briefly.

MR. MOLCHAN: I think it's hardly a secret.

MR. DOSS: I told you that everybody will come when we deposed them all.

[472] THE COURT: I guess my question would be, are you guessing at the 5,000 or are you saying up to?

MR. DOSS: Up — well, I guess it would — I think it would be appropriate to be up to. Yes, I am guessing.

THE COURT: Okay.

MR. DOSS: Just based on prior experience.

THE COURT: I will need an order in putting "up to."

MR. DOSS: I'm sorry. In the order I did put "up to"?

THE COURT: Yes, you did. And you also put — let me see. Okay. I will need a copy back — actually, I need several, one, two —

MR. DOSS: I don't have any copies of those two motions, Judge.

THE COURT: Do you want —

MR. DOSS: I need to fax one to JAC.

THE COURT: Okay. Is there — I already signed the order. I'm not sure that Mr. Lake is going to be real thrilled.

MR. DOSS: Mr. Lake is never real thrilled when I deal with him, only personally.

THE CLERK: Does he need to sign this motion?

THE COURT: Yes.

[473] MR. DOSS: Sorry.

THE COURT: All right. On the Mr. Ashton — because I know I gave you — originally, didn't I give you 5,000 and then I gave you another 2,500 or did I —

MR. DOSS: I think it was 25, 25.

THE COURT: It was 25, 25?

MR. DOSS: That's my recollection, Judge.

THE COURT: I have been signing so many checks, Mr. Doss, I can't keep them straight.

MR. DOSS: Unfortunately, for me, they are not for me, Judge.

THE COURT: I feel your pain.

THE CLERK: Do you need a copy of that too?

THE COURT: And this as well. This one is for you to sign. And if you will give it to the clerk. All right. All right. There you go, Madam Clerk.

THE CLERK: Okay.

THE COURT: Just for administrative purposes, too, Mr. Van Brussell met with me this morning.

MR. MOLCHAN: He's in the courtroom.

THE COURT: He's going to want to conduct a test over lunch. I told him that I would aim for 12:30 again. I normally would take a midmorning break, but I will probably try to push them for about an hour and 5 minutes because that will be how much when we come [474] in unless somebody tells me they can't make it that long. I would say aim for lunch for 12:15. If we are a little early, hopefully it will be okay.

MR. DOSS: I have about six witnesses lined up this morning. That's — my ambition is to clear at least six.

THE COURT: Well, one of the problems that we have is Mr. Van Brussell is going to need, he said, a minimum of 30 minutes to set up.

MR. DOSS: He came in and we talked.

THE COURT: He's asking for an hour. He's wanting us to be done by four, that is really pushing it, but —

MR. DOSS: I have them all lined up. Assuming that everybody follows instructions, I can get them done. I have Mr. Aldwin Dees, I will get him right up because he's got somewhere to go in the — military base that he has to be.

THE COURT: Okay. Well, knowing that lunch, we're aiming for 12:15 and then we'll take lunch from 2:15 to 1:15. You have 2:15 to 3:15 to push. You will have three hours this afternoon. We will do the best that we can.

MR. DOSS: The only other thing, Judge, I spoke to Mr. Molchan and he saw the same thing when [475] we left yesterday about the health incident or the commotion.

THE COURT: Right.

MR. DOSS: We both went out the front door and the ambulance is sitting there and the lady was out there. I don't know that she ever got in the ambulance.

THE COURT: She did not.

MR. MOLCHAN: Are you saying the front?

MR. DOSS: The general public entrance.

MR. MOLCHAN: The jurors go out another entrance.

MR. DOSS: That's why I told him — I have no idea how this building works. I walk out the front door —

THE COURT: Just out of curiosity — we're off the record on this.

(A discussion was held off the record.)

THE COURT: Back on the record.

As it related to the incident yesterday, whenever there is a situation where someone is expressing physical difficulties in the courthouse, they always call for the ambulance regardless. We have the ambulance down here on a regular basis. Because they didn't know the level of her distress, they did [476] call an ambulance and she did not go into the ambulance. She remained outside.

MR. DOSS: Judge, that's where I saw her when I came out, she was sitting down. She was not in the ambulance.

THE COURT: Where the emergency personnel or medical personnel would be is not anywhere where the jury could see them because we take the jury out the back entrance. We take them in and out through a back

entrance, and so they would not have been able to see the emergency personnel with — is her name Ms. Harrison?

MR. MOLCHAN: Yes.

THE COURT: Ms. Harrison.

MR. DOSS: That's the reason I brought it up because I, being out of town, have no idea how this building works. I don't know which parking garage exit they would be coming in and out of, or which exit they were coming out or anything like that.

THE COURT: Correct. I am the eyes and ears of any reviewing courts, so I want to make a record of everything.

MR. DOSS: Which is exactly what I wanted to do.

THE COURT: Okay. And again, I know you have [477] made a motion for mistrial yesterday; I denied it. And I don't know whether you're renewing or not.

MR. DOSS: I think it's appropriate to renew it, so we don't waive anything.

THE COURT: That's fine. Again, being the eyes and ears, I don't think it would be the expectation of anyone, this Court or these folks or the jury, that a mother seeing those pictures of her daughter would evoke some sort of emotional response, but I don't think that what happened rose to the level of requiring a mistrial. Okay.

MR. MOLCHAN: Okay.

MR. DOSS: Ready to go.

(Bench conference concluded.)

THE COURT: All right. If there's nothing further, bring in the jury.

COURT SECURITY: Yes, Your Honor.

THE COURT: Mr. Molchan, Mr. Doss, please remind me that I can't turn it off unless I hold the button. Help me remember.

(Jury present)

COURT SECURITY: The jury's in the box, Your Honor.

THE COURT: Let the record so reflect. Everyone please be seated.

[478] Mr. Molchan.

MR. MOLCHAN: We would like to bring some victim impact testimony before the Court at this time, Your Honor.

Have the witness on the stand?

THE COURT: Yes. Please raise you right hand.

(Witness sworn)

THE COURT: Go ahead and take a seat.

MR. MOLCHAN: Proceed, Your Honor?

THE COURT: Yes.

WHEREUPON, CATHERINE BARES, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MOLCHAN:

Q. Could you state your full name.

A. Catherine Bares.

Q. And your relationship to Ms. Harrison?

A. Cynthia was my sister.

Q. Do you have a statement that you would like to read for the jury at this time?

A. Yes, I do.

Q. You can proceed with that, please.

A. This is going to be harder than I thought. The day that Cindy was murdered, our lives were just [479] completely different.

THE COURT: Ma'am.

A. Thank you.

We were united. We were an extremely united family. We did everything together. We went from being happy and loving to disbelief, angry and even hateful towards each other. If I had an analogy to say it was like we were a completed jigsaw puzzle. Than someone removed one piece. It was only one mere piece, but that one missing piece destroyed the entire puzzle.

We searched — we searched for something to fill that spot, but in the end the puzzle was worthless. We fell apart. We went from having — I went from having two sisters to having none. I didn't just lose one, I lost both of my sisters. Both of my best friends. Where I held onto love and faith, my living sister held on to the anger. We went from doing everything together to barely speaking now. She's — we might talk once or twice a month, if that.

My children lost two very prominent people in their lives. My mom and dad went from a home filled with

visiting grandkids and all the laughter that came with that to less frequent visits.

Cindy would called Mom every day to talk to her, to check in with her, just to see what was going on. So when her number came up on the Caller ID that day, she [480] expected to hear Cindy's voice on the other end. It wasn't Cindy. It was the Pensacola Police Department, and I will never forget that day.

We had spent the morning at the baseball park with my kids, had a great time. We returned home to Mom's with her and the kids and even one of the kid's friend to spend the afternoon in the pool.

When mom come running to the back door, she let out this God-awful scream and fell to her knees crying, and my first thought was something had happened to my father.

There is really not a whole lot that I remember up to Cindy's funeral. I try to hold on to who she was and what she meant to us as a family. She was so full of laughter all the time. She had a special knack for surrounding herself with people, and that is the one thing that she had gifted me.

I figured out how she did it and I surround myself with lots of great people, and I thank her for that. She taught me how to do that.

I can remember watching the people pour into the funeral home the day of her funeral. She'd only lived in Pensacola for about a year or year and a half. There wasn't a seat left in the house. She touched so many lives.

And I think you have a picture for me.

[481] Q. Your Honor, at this time we have State's Exhibit No. 59.

THE COURT: Mr. Doss. So received.

MR. MOLCHAN: I will go ahead and publish it.

THE COURT: You may.

A. That was at her wedding. As you can see, she was a very petit person, but she shined. She shined so bright. She was a person that was full of strength, and she demanded respect from everybody around her.

For somebody that was so small in size, I looked up to her more than anybody else in the world.

Q. Thank you.

MR. MOLCHAN: Judge, at this point the State has conclude its presentation of evidence, and it will rest.

THE COURT: Mr. Doss.

MR. DOSS: Your Honor, the defense would call Aldwin Dees.

THE COURT: Face the clerk and raise you right hand.

(Witness sworn)

THE COURT: Go ahead and take a seat, sir. You sound like you may be soft spoken, so speak directly into the microphone.

[482] WHEREUPON, ALDWIN DEES,
having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. DOSS:

Q. Would you state your name for the record, please.

A. Aldwin Jaquez Dees.

Q. Where do you live?

A. Now I live at 6499 Bay Oaks, Milton, Florida 32583.

Q. And how are you employed?

A. U.S. Navy.

Q. Where did you live back in — on May 2, 1998?

A. Lincoln Park, 1311 Basin Street 32534.

Q. Did you — did you know Timothy Hurst at that time?

A. Yes, sir.

Q. Now, were you friends with Mr. Hurst?

A. He and I grew up together, yes, sir.

Q. Okay. Now, did you see — do you recall back on May 2 of 1998, do you recall seeing Tim that day?

A. Yes, sir.

Q. Why is it that you saw him?

A. Timothy came to my house to use my telephone.

[483] Q. When was that?

A. The early morning of the day you cited.

Q. Okay. What were you doing?

A. I was asleep.

Q. Whenever — whenever Mr. Hurst came and asked to use your phone, can you describe for a little more in detail what happened?

A. I was asleep, he knocked on the door and asked to use the phone, I handed him the phone, and I told him — you know, from just reading from the testimony that I have before, that when you get done on the phone, knock on the door and give me back the phone, and to my recollection, that's what he did.

Q. And you looked at that testimony just to refresh your recollection because of how far back it had happened; right?

A. Yes, sir.

MR. DOSS: No other questions, Judge.

THE COURT: May he be excused, Mr. Doss?

MR. MOLCHAN: I have no questions, Your Honor.

THE COURT: I saw you shaking your head.

May he be excused?

MR. DOSS: Yes, sir.

THE COURT: Thank you, sir.

MR. DOSS: Call Andre Cary.

[484] COURT SECURITY: Sir, step up to the chair and raise you right hand to be sworn.

(Witness sworn)

THE COURT: All right. Sir, you sound like you may be a little soft spoken. When you sit down, you go ahead and take a seat, make sure that you speak directly into the microphone.

WHEREUPON, ANDRE CARY,
having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. DOSS:

Q. State your name for the record, please.

A. Andre Cary.

Q. And where do you live, sir?

A. I stay — talking about city? Pensacola, Florida.

Q. Okay. And where do you work?

A. I work offshore.

Q. Where did you live back on May 2 of 1998?

A. On 1370 Portland Street.

Q. Did you know Mr. Hurst back at that time?

A. Yes, I did.

Q. How did you know him?

A. I went to middle school with him, and we stay [485] in the same neighborhood.

Q. Okay. Do you remember seeing Mr. Hurst back on May 2 of '98?

A. Can you be more specific?

Q. The day of the Popeyes murder, do you remember seeing Mr. Hurst?

A. Yes, sir.

Q. When was the first time that you saw him that day?

A. He came to my house to use the phone early. Like, I don't know the exact time, but I was in the bed. He came to use the phone because he had car problems, that's what he said that morning.

Q. Okay. Now, you — you actually worked at a Popeyes; right?

A. Yeah, my first day.

Q. That was your first day there?

A. Yes, sir.

Q. When was — when was the — well, let me back up.

Whenever he came to use the phone, were you the one that provided him the phone?

A. He never used the phone. My mother was on the phone.

Q. Okay. Did you — do you recall seeing any [486] blood on his pants?

A. No, sir.

Q. Do you recall seeing any blood anywhere on him?

A. No, sir.

Q. When is the next time that you saw Mr. Hurst that day?

A. I didn't see him no more.

Q. Okay. Were you scheduled to work at Popeyes that day?

A. Yes, sir.

Q. What time?

A. I believe around 10, scheduled at 10.

Q. What time did you leave your house?

A. Like, quarter until 10, because I stay down the street from the job.

Q. Okay. And do you recall about how long before you left Mr. Hurst did come by?

A. Say it again.

Q. About — do you recall about how long before you left for work did Mr. Hurst had come by?

A. No, sir. I didn't really check the time because when he came, I was in the bed and he came and woke me up out of the bed.

Q. Do you know Lee-Lee Smith?

[487] A. Yes, sir, I do.

Q. Was Mr. Smith with Mr. Hurst whenever he came by?

A. No, sir.

Q. Did Lee-Lee Smith ever offer you — offer to split up any money with you?

A. No, sir.

Q. Did he offer you any money along with Patrick Wallace?

A. No, sir.

MR. DOSS: No other questions, Judge.

CROSS-EXAMINATION

BY MR. MOLCHAN:

Q. Mr. Cary, so May 2 of 1998, that was going to be your first day starting at Popeyes?

A. Yes, sir.

Q. Did Mr. Hurst kind of help you out in getting that work at Popeyes?

A. No, sir.

Q. Did you know he worked there?

A. Yes, sir.

Q. And you were friends with him?

A. I know him from the neighborhood, yes, sir.

Q. From the neighborhood?

A. And I went to middle school with him.

[488] Q. And you didn't know he worked there at the Popeyes?

A. Yes, I say he did.

Q. You knew he worked there?

A. Yes, sir.

Q. And when you saw him later after that 9:45 time, again Mr. Lee-Lee Smith was not with him?

A. I didn't see him later.

Q. Okay.

A. Yes, sir.

MR. MOLCHAN: No further questions.

MR. DOSS: One other questions Judge.

REDIRECT EXAMINATION

BY MR. DOSS:

Q. Do you remember on what days you used to get paid from Popeyes?

A. Sir, I don't know. That was my first day, like I said. I don't remember none of that. That was fourteen years ago.

MR. DOSS: No other questions.

THE COURT: May he be excused?

MR. DOSS: Yes.

THE COURT: Thank you, sir. You're free to go.

MR. DOSS: Your Honor, we would call Patrick [489] Wallace.

(Witness sworn)

THE COURT: Go ahead and take a seat, sir. Make sure you speak directly into the microphone.

WHEREUPON, PATRICK WALLACE, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. DOSS:

Q. Please state your name for the record, please.

A. Patrick Bernard Wallace.

Q. Where do you live, Mr. Wallace?

A. 606 North B Street.

Q. Okay. Where did you live back in May of 1998?

A. 1545 Willimar Place, out there in the park.

Q. Back in May of 1998, did you know Timothy Hurst?

A. Yes.

Q. Did you know an individual named Lee-Lee Smith?

A. Yes.

Q. Do you remember the Popeyes murder case on Nine Mile Road?

A. Yes, sir.

Q. Regarding that, did — did — Lee-Lee Smith [490] ever indicate to you that he ever got any of the money that was taken from that Popeyes?

A. Yes.

Q. Okay. Do you know how much?

A. No.

Q. Did he ever offer you any of that money?

A. No.

MR. DOSS: No other questions, Judge.

MR. MOLCHAN: No questions.

THE COURT: Is he free to go?

MR. DOSS: Yes, Judge.

THE COURT: Thank you, sir. You're excused.

MR. DOSS: Judge, I would call Patty Hurst.

(Witness sworn)

THE COURT: All right. Ma'am, make sure to speak — you can go ahead and sit down, make sure you speak in the microphone.

THE WITNESS: Okay.

WHEREUPON, PATTY HURST,
having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. DOSS:

Q. State your name for the record, please.

A. Patty Hurst.

[491] Q. Now, Ms. Hurst, where do you live?

A. 6728 Figlen Avenue.

Q. Where did you live back in May of 1998?

A. Escambia Arms.

Q. Okay. Did you know Timothy Hurst back in May of 1998?

A. Yes.

Q. How did you know him?

A. He's my cousin.

Q. Okay. Did you — did you happen to see Mr. Hurst back in May of 1998?

A. Yes.

Q. What time of day was it that you saw him?

A. About 10, 10:30.

Q. Okay. How do you remember it was 10 or 10:30?

A. Because Soul Train was fixing to come on.

Q. Okay. When Mr. Hurst came over, was anybody with him?

A. Yes.

Q. Did you know who that was?

A. I mean, I don't know him personally, but I know who it was.

Q. Do you know his name?

A. I think it was Lee-Lee.

Q. Okay. Did Mr. Hurst — what did Mr. Hurst [492] come over to your home for?

A. My dad had needed to fix on his car.

Q. Was your dad there when Mr. Hurst got there?

A. No.

Q. Did Mr. Hurst stay at your house for a while?

A. Yes.

Q. How long would you say?

A. Probably a couple of hours.

Q. Did — did he ever get his car fixed?

A. I left myself, so I couldn't say if he did.

Q. How long do you think you were there?

A. Probably a few hours.

Q. Okay. But he was still there when you left your house?

A. Yes.

Q. And was the other — was the other person that you said you thought was Lee-Lee, was he there the whole time?

A. Yeah.

Q. Until you left?

MR. DOSS: Judge, I don't have any other questions.

CROSS-EXAMINATION

BY MR. MOLCHAN:

Q. Ms. Hurst, when the defendant came over, [493] Mr. Hurst, was he dressed in his Popeyes uniform?

A. No.

Q. He was in different clothing, wasn't he?

A. Yes.

Q. Did you know he was supposed to work that day?

A. Yes.

Q. But when he got to you at 10, 10:30, he wasn't in his uniform, was he?

A. No.

MR. MOLCHAN: No other questions.

THE COURT: Mr. Doss.

REDIRECT EXAMINATION

BY MR. DOSS:

Q. Was Tim acting any different that day than when you usually see him?

A. No.

Q. Did you see anything unusual whatsoever?

A. No.

MR. DOSS: No other questions, Judge.

THE COURT: May she be excused?

MR. DOSS: Yes, Judge.

THE COURT: Thank you, ma'am. You're free to go.

MR. DOSS: Judge, I would call Lola Hurst.

(Witness sworn)

[494] THE COURT: All right. Ma'am, make sure you speak directly into the microphone.

THE WITNESS: Okay.

WHEREUPON, LOLA HURST,

having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. DOSS:

Q. State your name for the record, please.

A. Lola Hurst.

Q. Where do you live?

A. 4591 Thairwood.

Q. Okay. Where did you live on May 2, 1998?

A. In Escambia Arms.

Q. Okay. Okay. Did you know a Timothy Hurst?

A. I'm sorry. What was that?

Q. Do you know a Timothy Hurst?

A. Yes.

Q. How do you know him?

A. He's my cousin.

Q. Okay. Back on May 2, '98, do you recall seeing Tim Hurst?

A. Yes.

Q. What time did you see him?

A. Around about ten.

[495] Q. Where did you see him at?

A. At my mama's place at Escambia Arms.

Q. And who was there?

A. It was me and my brothers and sisters.

Q. Okay. Were your parents there?

A. No.

Q. Did Mr. Hurst have anybody else with him?

A. I think he had a boy with him.

Q. Do you remember his name?

A. No.

Q. Okay. How long — how long would you say that Tim Hurst stayed there at your house there on May 2?

A. He stayed there for a long time because he was waiting for my dad to come and fix on his car.

Q. Okay. Did that ever happen?

A. No.

Q. How long would you say that he waited?

A. For a long — for a long time.

Q. And do you know why he left?

A. His mama called him.

Q. And then after that call, he left?

A. Yes.

Q. Okay. Was he acting any different than what he usually — how he usually acted on that day?

A. No.

[496] MR. DOSS: No other questions at this point Judge.

CROSS-EXAMINATION

BY MR. MOLCHAN:

Q. Just to make sure that I understand, Mr. Hurst was at the house — coming over to see you guys to have his car fixed by his father?

A. No.

Q. Or was it he was going to work on his father's car?

A. No, he came over there to fix — no. My daddy had to fix his car.

Q. That's what I wanted to make sure who was fixing whose car.

A. Yes.

Q. There was something wrong with his car, Mr. Hurst's car?

A. Yes.

Q. But he had driven it from where — where he was living; correct?

A. Uh-huh.

Q. To your location, had he not?

A. Yes.

Q. But then — did he ever get anything fixed with the car?

[497] A. No.

Q. Okay. So he just drove off with it?

A. Uh-huh.

MR. MOLCHAN: No other questions.

MR. DOSS: No redirect, Judge.

THE COURT: May she be excused?

MR. DOSS: Yes, she can be excused.

May I look out in the hall to see who is there?

THE COURT: Sure.

(Witness sworn)

THE COURT: Make sure you speak directly into the microphone. You can be seated.

WHEREUPON, SEQUESTER HURST, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. DOSS:

Q. Would you please state your name for the record.

A. My name is Sequester Hurst.

Q. And do you go by another name?

A. Tina.

Q. Do you know Timothy Hurst?

A. Yes, I do.

[498] Q. How?

A. That's my brother.

Q. Okay. Can you tell us what you do now?

A. I'm a supervisor at the Pensacola Airport for Republic Parking.

Q. Okay. Back in — I will turn your attention back to May 2, 1998, and do you remember back then?

A. Yes.

Q. Okay. And at that point in time had you ever lived apart from your brother?

A. No, sir.

Q. As far as your brother, can you describe your brother's personality for us?

A. He has a very up-lifting personality. He has a good personality.

Q. Okay. Explain for us, if you would, can you give us some insight, what was his mental capabilities?

A. His mental capabilities are those of — on the slow side, not up to speed, in my opinion, but on the slow side.

Q. How was — how was he mentally, as compared to — let me ask you this: How many brothers do you have?

A. I have three brothers.

Q. Okay. Any sisters?

A. No sisters.

[499] Q. Okay. So mentally how did he — how did he match up as compared to you and your other brothers?

A. Probably the youngest brother.

Q. Okay. And who's that?

A. His name is Jermaine.

Q. How much younger is Jermaine than Tim?

A. Oh, about seven, eight years. Six or seven years, uh-huh.

Q. Whenever you were — whenever you were growing up, who was it — who was it that looked after everybody, say, when your parents were gone?

A. Myself.

Q. Who thought they did?

A. Who thought they did?

Q. Yeah.

A. Timothy thought he did.

Q. Why was it that you — that it was really you instead of him?

A. Well, Timothy couldn't govern us properly, so to speak. I was more responsible with everyone and the decisions for all of us.

Q. How did Tim — how did Tim do in school?

A. He struggled. He struggled with grades. He struggled with classes. He — he struggled a lot through school.

[500] Q. So was he able to do — was he able to do his homework?

A. Without help, not good, but he had help. We would have to help him with his work to get him through with it.

Q. And was — would he try when he was trying to do this homework?

A. Yeah, he would try, but he could easily be frustrated with it so ...

Q. Now, whenever — whenever you were — whenever you were — whenever someone was helping with him, who helped him with the homework the most?

A. My dad. My dad.

Q. How did that work out, as far as with your dad helping him out?

A. It could be frustrating. It could be frustrating.

Q. How would your dad react whenever Tim wasn't getting it?

A. Sometimes a little annoyed. Really wanted him to do his best and — but sometimes a little annoyed.

Q. Did he ever — did he ever discipline him, as far as not being able to get the homework done?

A. Yes.

Q. And what would he do?

[501] A. Well, sometimes just, you know, how can I say, make him do more or he couldn't maybe watch TV or — for a little while, or just — it wasn't extensive, just maybe a little time to sit down and really go over it a little bit more, which it could be very annoying in itself.

Q. How — how was Tim's ability to follow instructions?

A. Give or take, depending on the severity of what's being asked. On — some complications with following instruction.

Q. Well, for — for example, if Tim was going somewhere, would he be able to get there by himself if it was an unfamiliar place?

A. If it was an unfamiliar place, yes.

Q. He could?

A. Well, I mean, he would have probably difficulty getting there. Familiar places, yes. Unfamiliar places, it would be kind of rough for him.

Q. How — let's talk a little bit about his ability to care for himself. Was he able — was he able to care for himself?

A. He was able to care for himself with the fact that we have to remind him a lot of things to do for himself.

Q. Well, for instance, was he able to wash his [502] own clothes?

A. We would — we would wash his clothes. My mother would wash his clothes.

Q. What about —

A. He wouldn't go in there and wash them. If he knew they were dirty, he would not say, "Hey, I'm going to wash my clothes," without somebody telling him that he would have to wash them. But most of the time, my mom would wash his clothes.

Q. What about being able to cook for himself? Was he able to cook for himself?

A. No.

Q. If you gave him — if you gave him, say, a box of food and you asked him to follow the directions and make it, would he have been able to make it?

A. No.

Q. How about as far as just being able to dress himself, was he able to dress himself appropriately for the weather?

A. Timothy would throw on whatever he felt he wanted to throw on. If it didn't match, it didn't match. If it matched, it matched. He just threw on whatever he felt comfortable with wearing.

Q. How about as far as hygiene, did you have any problems with him taking care of himself as far as bathing [503] or anything like that?

A. We'd have to tell him, you know — he likes to place basketball. He would go and play basketball and come in and sit maybe. A lot of times we would have to say, "Hey, you know" — for him to take care of his hygiene.

Q. Did he seem aware of it without you telling him?

A. No.

Q. Let me asked you this: Did he ever have a checking account?

A. No.

Q. If he had one, do you think he could have balanced that checkbook?

A. No.

Q. Do you think he would ever be able to run something like a cash register or something like that?

A. Not without it — not without the register probably inputting change, you know. If he had to figure it out, then I wouldn't think so.

Q. Okay. How about — how about as far as if you were to give him a bus schedule where he had a couple of transfers to make, do you think he could get himself where he had to be if there were transfers that he had to make and figure out what bus line to get on?

A. On his own?

[504] Q. Yes.

A. No.

Q. Now, as far as his vehicle, was he able to work on his vehicle?

A. He would try, but most of the time he would get someone else to fix it so . . .

Q. Who would that be?

A. I know my Uncle Jessie would work on his car, that's who he would normally take his car to.

Q. As far as making appointments and getting to where he needed to be, was he capable of that?

A. No, my mom would remind him.

Q. Was that — but was that beyond what she did for any of your brothers or you, as far as — as far as the level of having to — her having to be attentive to that?

A. She had to be especially attentive to him. The others were fairly younger, so she was able to keep up with those, those appointments for us.

Q. Could he manage his time and be where he needed to be on time without them doing that?

A. No, because we were — my mom would wake him up for work or — or, you know, they would always have an alarm to kind of see him through what he would need to do throughout the day.

Q. Now, as far as at school, how about [505] interacting with other kids, how did that go for Tim?

A. You know, he would get teased sometimes, a lot times. He's more to me like a jokester. He's more of a follower. He always tried to fit in, you know, with others, tried to be the likeable person.

Q. Did he ever get picked on?

A. Yes.

Q. And what would he get picked on for?

A. It could be something ranging from the way he looked that day or clothes, maybe hygiene that day. It was just whatever he had going on.

Q. What about as far as his mental capabilities?

A. Oh, he was slow. He — when he talks, he stutters, so he would get teased about the way he would talk as well.

Q. Now, what — what would you say was Tim's maturity level as far as when you lived together at home?

A. His maturity level was that of, in my opinion, a small child.

Q. Did he — did he act — did he — you had other younger brothers. Did he act at the level of any of them?

A. More so my younger brother.

Q. Which one is that?

A. His name is Jermaine.

[506] Q. How much younger is he?

A. Six years, maybe seven years.

Q. Now, as far as discipline in the home, how — explain to me how that — how that would be handled in your house when you were growing up.

A. We would be disciplined by belt, switches, in the corner, punishment, no play time. I mean, it ranged from whoopings to nothing — no TV.

Q. How — how often was Tim punished in relation to you and your brothers?

A. I would say that he was — him being the oldest, he was more punished than me and my brothers.

Q. Why do you think that was?

A. Because it was hard for him to do things right, how things considered needed to be done by my parents.

Q. Was he able to do chores?

A. Sweep a floor. I mean, half — half-done chores, half-done chores.

Q. If you gave him a list of chores and didn't follow up on it, would he be able to get it done?

A. No. No.

MR. DOSS: Can I have one second, Judge.

Q. (By Mr. Doss) Did you ever see your brother get violent?

[507] A. No.

Q. What about even when he was — even when he was teased?

A. He would get angry, not to the point of striking anyone. I think it was more of his feelings being hurt than anything. He would say some words, but none to the point of where he would physically hit someone.

Q. Do you — do you know Lee-Lee Smith?

A. Yes, sir, I do.

Q. Did you know him back in May of '98?

A. Yes, sir, I did.

Q. What was his relationship with Tim?

A. They were friends.

Q. In that — in that relationship, how would you — how would you characterize that relationship as far as did one or the other run the show?

A. Timothy was more of a follower, so Lee-Lee was you know, a little head strong more so than Timothy.

MR. DOSS: No other questions at this point, Judge.

THE COURT: Thank you.

CROSS-EXAMINATION

BY MR. MOLCHAN:

Q. Now, as Mr. Hurst, the defendant, was growing up and you were doing homework in the home, he was getting [508] help, though, wasn't he, from your father?

A. Uh-huh.

Q. And would you help out at times too?

A. Yes, sir, I would.

Q. And the same — there's three brothers, one sister?

A. Uh-huh.

Q. Were your other brothers — I use the term being men, sometimes, or being boys, there is kind of that difference in girls and boys when they are growing up. Some people think girls are much more responsible than boys.

Were your other brothers when they were younger, less apt, including Mr. Hurst, less responsible than you were being?

A. I think I would say I'm the most responsible of them all.

Q. Of them all?

A. Of them all.

Q. Now, as far as the discipline in the home, was Mr. Hurst treated any differently as far as discipline than any of your other — than yourself or your other brothers?

A. Yes, sir, at times.

Q. What was the difference?

A. Well, because he was older, he was assumed to, you know, know more, which he didn't. He would always try.

[509] Q. Okay. Maybe I didn't — didn't phrase the question. I understand what you're saying.

I guess what I'm saying is, if he didn't do something and you didn't do something, were you treated differently discipline-wise?

A. Yes.

Q. Well, how is that?

A. I think they were a little milder on me because I was a girl.

Q. What about the brothers?

A. Because they were younger, yes.

Q. Okay. Now, let me ask a question: Mr. Hurst, the defendant, was working at Popeyes, you were aware of that; correct?

A. Yes, yes.

Q. And had worked there for several months prior to the crime, had he not?

A. Yes.

Q. And he had gotten to work?

A. Yes.

Q. You didn't hear any problems with him working there, did you?

A. No, except for sometimes he would go to work late.

Q. Okay.

[510] A. Uh-huh.

Q. In fact, part of what Mr. Hurst wanted to do, the defendant, is he wanted to get his — one of the goals that he had was to get a car, wasn't it?

A. Yes.

Q. He basically worked getting money to buy a car, did he not?

A. He had help getting a car from my dad.

Q. But, I mean, he worked from a standpoint of obtaining money, did he not, for the car?

A. Yeah, my dad would give him money.

Q. That was a goal of his, wasn't it?

A. Well, I can't say it was one of his goals, but I think Timothy just wanted a job. He just wanted to make money.

Q. Okay. He wanted to make money?

A. Uh-huh.

Q. Now, as far as washing clothes, did your mom wash everybody's clothes altogether?

A. She didn't wash mine.

Q. What about your brothers?

A. She washed — between me and my mother, we would wash their clothes.

Q. And as far as in the home that you lived in, that Mr. Hurst lived in, your parents, they taught y'all the [511] difference between right and wrong, did they not?

A. Yes.

Q. And you indicated that even when Mr. Hurst was picked on at school, you're aware of that happening?

A. Yes.

Q. For a number of reasons. And he got angry didn't he, is that what you said?

A. I mean, I think he was more hurt than angry.

Q. Well, I thought —

A. He would try so hard to fit in. He was more hurt than angry.

Q. And this happened a lot, so this — did this happen more than once?

A. It happened more than once, yes, sir.

Q. Well, I mean, you indicated, I wrote down, that at some point he said some words to these people that upset him?

A. Uh-huh.

Q. But he never — he never harmed anybody that you're aware of?

A. No, sir.

MR. MOLCHAN: No other questions.

THE WITNESS: Thank you.

MR. DOSS: Just one or two, Judge.

[512] REDIRECT EXAMINATION

BY MR. DOSS:

Q. Ma'am, Mr. Molchan had asked you as far as whether your brothers were less responsible than you, meaning your younger brothers as well?

A. Uh-huh.

Q. What about as compared to Tim, how would you compare the responsibility level of your younger brothers and Tim?

A. My younger brothers didn't have many responsibilities, as Tim did.

Q. What about as far as meeting the responsibilities that they did have?

A. I don't think they — they would have those — they didn't have responsibilities. They didn't have the same responsibilities that Timothy would have, so there is a difference as far as what, you know, I sum up, as far as the responsibilities, his responsibilities was here and their responsibilities was there due to the age.

Q. That was — that was the expectations of your parents based on the chronological age of all of your brothers?

A. Yes, sir.

MR. DOSS: No other questions.

THE WITNESS: Yes, sir.

[513] THE COURT: May she be excused?

THE WITNESS: Thank you.

THE COURT: You're free to go.

THE WITNESS: Thank you.

MR. DOSS: Timothy Bradley.

COURT SECURITY: Step up and raise you right hand to be sworn.

(Witness sworn)

THE COURT: Sir, make sure you speak directly into the microphone. Take a seat.

WHEREUPON, TIMOTHY BRADLEY, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. DOSS:

Q. Would you state your name for the record, please.

A. Timothy Bradley.

Q. Where do you live, Mr. Bradley?

A. 7870 Aaron Drive.

Q. Where do you work, sir?

A. Deca Commissary out by Corry Station.

Q. How long have you worked there?

A. I have 27 years.

Q. Do you know Timothy Hurst?

[514] A. Yes.

Q. How do you know Mr. Hurst?

A. That's my son.

Q. Is that your biological son?

A. Yes.

Q. Now, as far as — as far as — let's talk a little bit about your — do you remember May 2, 1998, the day of the Popeyes murder?

A. I remember most of it.

Q. Okay. Do you remember seeing your son Timothy that day?

A. Yes.

Q. Tell us how you remember that.

A. Well, I get off — I was working night shift at the commissary. I get off at 6 o'clock in the morning. I usually get home about 6:25, 6:30, and he was at home when I got there.

Q. Okay. What was he doing when you got there?

A. He was laying in the bed.

Q. Okay. And what time — did there come a point in time that morning when you left?

A. Right. Yes, uh-huh.

Q. What time did you usually leave in the morning?

A. Well, I did construction work too, so, you [515] know, depends on, you know, if my father needed me or not. So that morning I — after I got there, I took me about a 30-, 45-minute nap and then I got up and got ready.

Q. What time did you leave that morning?

A. I left about 7:45.

Q. When you were leaving that morning, did you see Tim?

A. Yes.

Q. What was he doing?

A. He was putting his battery back into his car because he had it on the charger overnight.

Q. How — how was Tim — how was Tim at fixing cars?

A. He wasn't. Me and my son usually did most of the mechanic work, but, you know, he could put a battery in.

Q. Did his — did his uncle ever help him out on the cars too?

A. Yes, he did too.

Q. What was his name?

A. Well, we call him Dream, but his name is Jessie.

Q. Okay. His last name is Hurst?

A. Right, yes.

Q. Now, let's talk a little bit about — about Tim, in general. Now, can you tell us, how — how was he in [516] the developing, as far as compared to your other kids, say, for instance, learning to talk?

A. He took a little longer.

Q. Did he take a little longer at any — any other things that we look at when we're watching little kids grow up?

A. Just about anything, yes.

Q. So learning to walk and learning to talk?

A. Yes.

Q. Okay. Now, your daughter — daughter, Tina, she's pretty close in age to Tim; right?

A. Yes.

Q. How far apart?

A. I think about two years.

Q. Did — how — how did — how did — if you had to compare Tina and Tim, as far as how they developed, how would you — how would you describe that?

A. She developed a lot faster.

Q. In any particular thing or in all things?

A. Just about anything.

Q. Whenever — whenever you were trained to teach Tim things, if you had to compare the way he learned to the way your other kids learned, how would you describe that?

A. It would be the same, it took him longer.

Q. If you gave — if you gave Tim a list of [517] chores to do, would he be able to complete it without you coming and checking up on him?

A. No.

Q. When Tim — when Tim was growing up, how would you characterize his school — his school — or how he did in school, how would you characterize that?

A. Not too good.

Q. So he had some problems there?

A. Yes.

Q. What did you — what did you try to do about it at home?

A. Well, we just, you know, take books and stuff and show him different things at home.

Q. How did that go?

A. Still took him time to get it.

Q. Was he ever able to, say, master multiplication?

A. No.

Q. How about division?

A. No.

Q. How was Tim's ability to read or write?

A. He hardly ever read anything.

Q. When he had to?

A. No, he wasn't too good of a reader.

Q. How about whenever Tim would go apply for a [518] job, would he be able to apply for the — fill out the job application at the site?

A. No, he would have to bring it home and we would help him.

Q. When you say "we would help him," who would that be?

A. Me or my wife would, or my daughter.

Q. Did you ever know Tim to have a bank account?

A. No, he never.

Q. If he had a bank account, would he be able to balance a checkbook?

A. No.

Q. Was he able to manage his money?

A. No.

Q. Now, did you — did you do anything to help him manage his money?

A. Yes.

Q. What was that?

A. I would help him count it and we would keep it stored in a safe place.

Q. How about as far as when he had anything to pay, would he remember to pay it, the few bills that he had?

A. We would have to remind him.

Q. Would he remember if you didn't remind him?

A. Probably not.

[519] Q. Was Tim able to cook for himself?

A. No.

Q. If you asked him to go and make something, say you had a box with instructions on it, would he be able to prepare by the instructions on the box?

A. No.

Q. You don't think he could be successful in doing that?

A. No.

Q. Do you think he could follow any of the measurement directions on the box?

A. If someone was there to help him.

Q. But on his own, do you think he could do it?

A. No.

Q. What about when Tim would have to go places that he wasn't familiar with, would he be able to get there on his own?

A. If it was the first time, someone would have to show him. Maybe after he went a couple of times, then he would know how to get back on his own.

Q. If you were to give Tim a map and tell — and point to where he needed to go on the map, would he be able to get himself there if nobody helped him?

A. No, at some point in time if nobody was with him, he would have to call and someone would have to give [520] him more instructions.

Q. What about — what about if he had to get somewhere and, say, you gave him a bus schedule to get somewhere else in town and he had to make a couple of transfers, do you think he would be able to do that on his own without any help?

A. No, he would have to have the bus driver or whoever that was to assist him.

Q. How was Tim as far as — as far as being able to — to keep himself and his things clean?

A. No. No.

Q. How did that — how did that work at your house?

A. Well, mostly my wife, you know, she kept most of the clothes and things washed, so they really didn't have too much worry about it.

Q. If Tim had to wash it himself, would he do it?

A. You would have to probably keep reminding him to do it.

Q. How about as far as his own personal hygiene, like taking showers and baths and things like that, how would you characterize that?

A. I would say on a scale of one to ten, maybe a four.

Q. Okay. Okay. What was — what was Tim's [521] ability as far as time management?

A. No.

Q. You say "no." Explain to us what you mean by no?

A. Because a lot of times we would have to let him know if he had to be somewhere.

Q. If you didn't let him know he had to be somewhere, would he typically get there on time?

A. Probably not.

Q. How about making appointments for himself and being able to — to make the appointment and show up at the appointment on time, would he be able to do that by himself?

A. No.

Q. How did discipline work in your house?

A. Well, they weren't to — we didn't have to discipline them too much because they — you know, they did more like kids stuff when they were growing up. Then when they got older, they more like obeyed, so we didn't really have to do too much discipline.

Q. During that period of time, how many jobs did you work?

A. What point in time?

Q. During — back in May of '98, you indicated you had two jobs.

A. Well, my actual job was at the commissary. [522] Like I say, I helped my father because he had his

own cement finishing business. Whenever he needed some help, then he would call me and I would go help him.

Q. Did you do that on a pretty regular basis?

A. It was kind of, like, regular almost, yeah.

Q. That's a lot of hours working; right?

A. Yeah.

Q. When you were away, I guess your wife was kind of in charge of taking care of all of that stuff?

A. Right.

MR. DOSS: No other questions at this point, Judge.

CROSS-EXAMINATION

BY MR. MOLCHAN:

Q. Mr. Bradley, your son bought a car, didn't he, or got a car?

A. Yes.

Q. Tell us — how did that occur?

A. Well, like I said, we helped him. I helped him got the car, actually.

Q. Did he want one, a car?

A. Yeah, he wanted one.

Q. Did he get a driver's license?

A. Yes, he got one.

Q. And did he pay you for parts — as far as the [523] car is concerned, did he pay you money or did he pay the person he bought it from?

A. We paid the person that he got it from.

Q. Where did that money come from?

A. It came from me.

Q. Was he going to pay you back?

A. No.

Q. It was just something you —

A. I just bought it for him.

Q. And then basically — just — I want to clarify something.

On the day, on May 2 when you left, he was putting the battery in the charger or taking the battery off of the charger?

A. He had took it off the charger and he had the hood up, he was fixing to put it in the car.

Q. He's putting the charged battery —

A. Right.

Q. — into the vehicle that you had worked out buying for him?

A. Right.

Q. Now, was he dressed in his Popeyes uniform?

A. Yes.

Q. How long had he been working at Popeyes; do you recall?

[524] A. At that time I couldn't actually say.

Q. Didn't have any problems with that, though, that you're aware of? Didn't have any problems at work that you're aware of?

A. Not that I know.

MR. MOLCHAN: No other questions.

MR. DOSS: He can be excused, Your Honor.

THE COURT: Thank you, sir. You're free to go.

MR. DOSS: Call Jermaine Bradley.

COURT SECURITY: Sir, step up by the chair and face Madam Clerk and raise you right hand.

(Witness sworn)

THE COURT: Go ahead and take a seat and make sure you speak directly into the microphone.

WHEREUPON, JERMAINE BRADLEY, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. DOSS:

Q. State your name for the record, please.

A. Jermaine Bradley.

Q. Where do you live? Where do you live?

A. Lincoln Park.

Q. Okay. Where did you live back in May of 1998?

[525] A. Lincoln Park.

Q. And do you know Timothy Hurst?

A. Yes, I do.

Q. How do you know him?

A. That's my brother.

Q. Okay. Do you remember back in May of '98, when the murder happened at the Popeyes?

A. Yes.

Q. Do you recall seeing your brother that day?

A. Yes.

Q. When was the first time that you saw your brother that day?

A. It was around about — between eight or nine in the morning.

Q. Okay. And when you saw your brother, was anybody with you?

A. Yes.

Q. Who was with him?

A. Lee-Lee Smith.

Q. When your brother — when you saw your brother, was he — had he been gone?

A. Yeah.

Q. When he came — when he came back, what was — do you recall what he was dressed in?

A. He had on his work uniform.

[526] Q. And did you see any blood on that work uniform?

A. No, I did not.

Q. Did Tim seem to be acting in any different way than usual?

A. No, he wasn't.

Q. Did you — did you do — when Tim came back, what, if anything, did you do with Tim?

A. We played a video game for a little bit and then we left.

Q. Okay. Where did you leave to?

A. We went to Wal-Mart.

Q. Who did you — who did you go to Wal-Mart with?

A. Me; my brother, Anthony William; and Lee-Lee Smith.

Q. And Tim?

A. Yes.

Q. What did you buy at the Wal-Mart?

A. He went and got some shoes.

Q. And did you go anywhere after that?

A. Yeah, we went to the pawn shop right across the street from Wal-Mart.

Q. What did you go to the pawn shop for?

A. I went and bought two necklaces.

[527] Q. Who actually purchased them?

A. My brother actually purchased them because I was underage to get them.

Q. Your brother Tim purchased them.

A. Yes.

Q. Where did your money come from?

A. Anthony Williams.

Q. Who is that?

A. That's a friend of mines.

Q. Okay. Was — how old was he? Was he old enough to purchase anything at the pawn shop?

A. No, he wasn't.

Q. What did you do after you were done at the pawn shop?

A. Came back home.

Q. What did Tim do?

A. He stayed there for a little longer and then he left.

Q. Did you know Lee-Lee Smith?

A. Yes, I did.

Q. Let me — let me talk to you a little bit about Tim, in general. Whenever you-guys — whenever you guys were — were growing up, how did — how did Tim do as far as — as intellectual, was he able to do as well in school?

[528] A. No, not to my knowledge.

Q. Did he — did he have any trouble understanding things?

A. Yes.

Q. Did he seem — did he seem to be able, if you had to compare his ability to pick things up as compared to you and your brother and sister, how — how would you compare that?

A. He's below us.

Q. Okay. So he was slower than you?

A. Yes.

Q. How much younger are you than he?

A. About — about five or six years, I think.

Q. Okay. When you were growing up with Tim and your parents left, who was in charge?

A. My sister.

Q. Why was that?

A. She was more responsible.

Q. Okay. Whenever there at your house growing up, if Tim was given a list of chores, was he able to complete those chores without anybody following up with him?

A. No.

Q. Would he — would he get in trouble for not doing his chores?

A. Yes.

[529] Q. Would anybody in your house that didn't do their chores get in trouble?

A. Yes.

Q. In relation to the rest of you, how often did Tim get in trouble?

A. Well, he always took the blame for us, anything that we did, so you might as well say often.

Q. So Tim often took the blame for you?

A. Correct.

Q. Did — as far as homework, how did that work at your house? Was Tim able to do his homework by himself?

A. No.

Q. How — how did he complete his homework?

A. With help by my parents.

Q. Who was usually the one that did that?

A. My dad.

Q. Can you describe for us how that worked?

A. No, I can't.

Q. Okay. You were busy doing other things, other than homework?

A. Yes.

Q. Did you ever know your brother to have a bank account?

A. No.

Q. Do you think he could have balanced a [530] checkbook?

A. No.

Q. Do you think that Tim would be able to — if you had given Tim, say, a box of food to prepare, would he be able to follow the instructions on that and be able to cook whatever it was?

A. No.

Q. If Tim had to get somewhere that he didn't — that he had never been before, was he able to do that by himself?

A. No.

Q. What about if I — if Tim had to be somewhere unfamiliar and you were to give him a bus schedule and he had to make a couple of transfers, do you think he would be able to get there?

A. No.

MR. DOSS: I don't have any other questions at this point, Judge.

CROSS-EXAMINATION

BY MR. MOLCHAN:

Q. Now, Mr. Bradley, on May 2nd, when this happened, isn't it true that Mr. Hurst, your brother, went to the pawn shop and also bought some rings, isn't that true?

A. I don't know nothing about that.

[531] Q. Okay. But he bought a new pair of shoes at the Wal-Mart; correct?

A. Correct.

Q. Now, as far as discipline in the home, if you didn't do your chores, you got in trouble; would that be fair to say?

A. Yes.

Q. If your sister did something wrong, she would get in trouble?

A. Yes.

Q. And as far as your dad helping Mr. Hurst, the defendant, he's working several jobs at this time, but he still took time to help him out with his homework when he could; correct?

A. Correct.

MR. MOLCHAN: No other questions.

MR. DOSS: I have something else, Judge.

REDIRECT EXAMINATION

BY MR. DOSS:

Q. Mr. Bradley, as far as — as Tim's relationship with Lee-Lee Smith, were you familiar with that?

A. In a way.

Q. Did you see them together very often?

A. Yes.

[532] Q. How would you characterize their relationship?

A. It was — it was close.

Q. Okay. Did either one of them seem to run the show, so to speak?

A. Yes.

Q. Who was that?

A. Lee-Lee Smith.

Q. Would you — when you say that, who made most of the decisions in that relationship?

A. Lee-Lee Smith.

MR. DOSS: No other questions.

MR. MOLCHAN: Since that is new, can I follow up?

THE COURT: You may.

RECROSS EXAMINATION

BY MR. MOLCHAN:

Q. Now, you said in a way you knew the relationship, did you watch them on a daily basis interact?

A. I see them together almost all the time.

Q. Okay. And then Mr. Smith was only 15 around May, 1998; correct?

A. I don't know his age.

Q. But he didn't have a car, did he, Mr. Smith?

A. Yes, he did.

Q. He did, at 15?

[533] A. Yes.

Q. Okay. But — and your brother had a car; correct?

A. Yes.

MR. MOLCHAN: No other questions.

THE COURT: Mr. Doss.

MR. DOSS: None, Judge.

THE COURT: May he be excused?

MR. DOSS: Yes.

THE COURT: You're free to go.

MR. DOSS: May I approach?

THE COURT: Yes. Do you need the court reporter?

MR. DOSS: No.

THE COURT: I figured it was administrative.

(Bench conference not reported)

THE COURT: Mr. Doss, call your next witness.

MR. DOSS: Bertha Bradley.

(Witness sworn)

THE COURT: You can take a seat, ma'am. Just make sure you speak directly into the microphone.

THE WITNESS: Okay.

WHEREUPON, BERTHA BRADLEY,
having been first duly sworn, was examined and testified as follows:

[534] DIRECT EXAMINATION

BY MR. DOSS:

Q. Would you please state your name for the record.

A. Bertha Bradley.

Q. Ms. Bradley, where do you live?

A. 7870 Aaron Drive.

Q. Where did you live in May of 1998?

A. 7870 Aaron Drive.

Q. Do you know Timothy Hurst?

A. Yes.

Q. How do you know him?

A. He's my son.

Q. I want to turn your attention back to May 2,

of '98, the day of the Popeyes murder. Do you remember seeing your son on that day?

A. Yes.

Q. And when did you first see your son that day?

A. I seen him that morning.

Q. And what were you doing when you saw him?

A. I was going to the bathroom.

Q. What time of morning was it?

A. It was 7 — 7:17.

Q. How do you know it was 7:17?

A. Because I keep a clock by my bed.

[535] Q. And where was — where was your son when you got up at that point?

A. He was laying in his room on a pallet.

Q. Okay. Did you — when is the next time that you saw your son?

A. When I got back up about 7:40, to get him up to go to work.

Q. And did he get up to go to work?

A. Just a little bit, you know, then he got up.

Q. Okay. What did you do?

A. Went back to bed.

Q. Okay. When is the next time that you remember seeing your son that day?

A. I seen him that — that morning when he came home.

Q. Okay. Do you remember — do you remember around what time that was?

A. That was when I called him, he came home.

I don't know exactly what time.

Q. What — what did you call?

A. I had called down to my brother's house, he was down there getting his car fixed.

Q. Okay. Why did you call him?

A. Because the police had came to my house.

Q. Okay. Did he come home?

[536] A. Yes, he came home.

Q. Okay. Now, as far as — let's talk a little bit about Tim, in general. How — how old were you whenever you had Tim?

A. Fifteen, going on 16.

Q. Okay. How would you — how would you describe your pregnancy with Tim?

A. Well, all I did was drink a lot. I didn't really care.

Q. You didn't care at that point?

A. Uh-huh.

Q. When you say you drank a lot, is that while you were pregnant with Tim?

A. Yes.

Q. How often would you say that you drank?

A. From the time I get up until the time I go to bed.

Q. This was a everyday thing?

A. Uh-huh.

Q. Was that just part of the pregnancy or —

A. I just had a taste for it.

Q. But as far as during the period of time that you were pregnant with Tim —

A. Yes.

Q. — that was the whole time?

[537] A. The whole time.

Q. Now, after Tim was born, was there a point in time when you didn't have him?

A. They took him away from me.

Q. Who was that?

A. The — the courthouse — the courthouse people.

Q. The Department of Children and Families?

A. Yes.

Q. How long was he away from you?

A. For about a good three weeks.

Q. Okay. And eventually they gave him back to you?

A. Yes.

Q. Why was it that they took him away from you?

A. Because I drunk too much, and I loved to go out a lot and I would leave him.

Q. When Tim was growing up — now, let me ask you this: How many kids do you have?

A. Four.

Q. When Tim was growing up — if I asked you to compare how fast he developed as compared to them with things like, say, learning to walk, how would you describe that?

A. He was slow, very slow.

[538] Q. It took him a little bit longer?

A. It took him a long time, yes.

Q. What about learning to talk?

A. Slow.

Q. Did he have difficulty speaking?

A. When he talked, it was like he skipped — slur, like it get real long and he can't pronounce the words.

Q. Okay. Your — your daughter Tina, how close in age is she to Tim?

A. A year.

Q. How would you compare those two, as far as how fast they developed?

A. I compare them like night and day. She was really fast. She was walking and he was still trying to get up.

Q. Even though she was that much younger than him, she started walking before Tim?

A. Uh-huh.

Q. Is that a yes?

A. Yes, sir.

Q. What about as far as learning how to talk?

A. I still don't understand what he be saying, you know. He talk funny still to me.

Q. It's still hard to understand?

[539] A. Uh-huh.

Q. How — how was Tim once he became school age, how did Tim do in school?

A. Not good.

Q. Did he ever do good in school?

A. He tried. I believe in the second grade, but — it didn't turn out right, and he just — he just, like, couldn't do it, just couldn't do it. He just went by.

Q. So no matter how hard he tried, he couldn't do it?

A. Yes.

Q. What, if anything, did you do at home to try to help him out with school?

A. We basically do everything for Tim.

Q. Did you work with him on his homework?

A. Sometimes my husband do sometimes, or he get answers from TinA.

Q. How did Tim do in school compared to your other kids?

A. Not good.

Q. No?

A. Huh-uh.

Q. What about as far as around the house, if you — if you gave Tim a list of chores, would he be able to — would he be able to do that without you following around [540] behind him?

A. No, sir.

Q. What about as far as taking care of himself,

as far as being able to cook a meal, did he do that?

A. No, sir.

Q. If we — if we gave him — if we gave him a box of food that had the instructions right on it, do you think Tim would be able to do that?

A. No.

Q. What about as far as washing his clothes?

A. No.

Q. Who did that?

A. I did.

Q. If you didn't do it or Tina didn't do it, would Tim do it?

A. No, it wouldn't get done.

Q. Did there ever come a point in time that the school wanted to put Tim in special education classes?

A. They did, but I wouldn't let them. I don't want him to be picked on.

Q. You thought he would be picked on more if you let him in?

A. Uh-huh.

Q. Was Tim — was Tim picked on at school?

A. Uh-huh.

[541] Q. Why was he picked on?

A. He slow. He goofed around. He just didn't — he didn't understand what they were saying, what the other children were really doing.

Q. He just didn't get it?

A. He didn't get it.

Q. How would you characterize Tim's personality?

A. He's nice, he's great. No — never had no problem with him. He's a good child.

Q. Did he like to joke around?

A. Yes, he be funny.

Q. Did Tim — I'm sorry.

A. I'm sorry.

Q. Are you all right? Did Tim ever have trouble in school as far as getting reprimanded at school?

A. He basically stayed out of school. He wouldn't go, but he couldn't — he couldn't maintain. He would be at home — he would be at home more than he would be in school.

Q. Did he ever live outside of your home?

A. Uh-huh.

Q. Did he ever — did he ever live away from home before he went to jail?

A. Never.

Q. Now, we were — we were talking a little bit [542] about Tim being able to do things for himself. Was he — was he able to dress himself appropriately for the weather?

A. Huh-uh, I had to make him, you know, put on something.

Q. What about as far as being able to match up his clothes?

A. He would never do that.

Q. How about as far as taking showers and bathing?

A. I would have to make him.

Q. Do you — did Tim ever have a bank account?

A. No, sir.

Q. If he did, do you think he would be able to balance that checkbook?

A. No.

Q. How did he manage his money?

A. Well, he mostly — if he needed something, he got it from his daddy, his daddy.

Q. What about once he started working, was he able to manage his money from working?

A. No.

Q. Could he — could he keep himself on a budget?

A. No.

Q. Now, if you told Tim to go somewhere that was unfamiliar to him, would he be able to get there by himself [543] if you or another family member or somebody that was close to him didn't go with him?

A. We would have to give him direction.

Q. Okay. Would he be able to — would he be able to — say, if we gave him — gave him a bus schedule, told him to go across town and he had to make a couple of transfers, do you think he could do that by himself?

A. No.

Q. Did you — did you ever ride with him when he drove?

A. Never.

Q. How come?

A. He drives too slow.

Q. When you say "too slow," how would he drive in relation to the rest of the traffic?

A. Just — he would go on — the rest of the traffic going 60, he's either going 25 or going 30.

Q. How would you — how would you describe Tim's concept of time? Was he able to get where he was supposed to be on time?

A. No.

Q. If you didn't remind him or your husband didn't remind him, would he get there on time?

A. No.

Q. Was he able to set appointments and get [544] himself to the appointment by himself?

A. No, I did that.

Q. If you didn't do that, would it —

A. It wouldn't get done, no.

Q. Would Tim play in, like, card games and board games and strategy games, those kinds of games, with your other children — with your other children or friends?

A. We play — I teached him. We played, yeah, not a little bit — not with no friends, but at home, uh-huh.

Q. Now, about whenever — whenever you would go out in public, did Tim — did Tim always have a good concept how to act, say, like, at a restaurant?

A. No, huh-uh.

Q. Why do you say that?

A. Because we had took him out to dinner one day and instead of him getting the plate to put food in, he just went up there and took the whole tray and sat down and just started eating, that's — that's what he thought he was supposed to do.

Q. That was at a buffet?

A. Uh-huh.

Q. No other questions — I'm sorry. I'm sorry. I forgot. Tell us how discipline worked at your home.

A. Sir?

[545] Q. How did you go about disciplining your children at home?

A. Well, when they got in trouble, I give them a whooping.

Q. Who did that?

A. I did; their dad did.

Q. Did Tim get more than the other kids?

A. Uh-huh.

Q. Why was that?

A. Because the children would put it on him and he'd take the blame for it.

Q. And when you say you would give him a whooping, how would you do that?

A. I'd whoop him.

Q. What would you use?

A. A switch, belt.

Q. What about his dad?

A. Same.

Q. Did that happen very often?

A. Just about — yeah.

MR. DOSS: No other questions, Judge.

CROSS-EXAMINATION

BY MR. MOLCHAN:

Q. Ma'am, you indicated that you drank the whole time that you were pregnant with Mr. Hurst?

[546] A. Uh-huh.

Q. The entire pregnancy?

A. Yes.

Q. All nine months?

A. All nine months.

Q. With your other children, did you drink with them?

A. I drunk with all the boys, except I tried to drink with the girl and it wouldn't go down.

Q. But you drank with the — with his other brothers, you drank the same volume and the same amount?

A. Uh-huh, and I do it now.

Q. And it's your testimony that basically — well, let me ask this question then: Your other sons that you drank the same amount, did they have this problem, the same problem at school that Mr. Hurst did?

A. They not in school. They all dropped out too.

Q. But did they have the same problems that you talked about with Mr. Hurst?

A. I don't know that.

Q. Now, as far as — you indicated that Mr. Hurst stutters or slurs his speech and that you even find it hard to understand, is that your testimony?

A. Yes.

MR. MOLCHAN: No other questions.

[547] THE COURT: Mr. Doss.

MR. DOSS: None.

THE COURT: May she be excused?

MR. DOSS: Yes, Judge.

THE COURT: Thank you, ma'am. You are free to go.

All right. Mr. Doss, I had asked for lunch to be delivered about 12:15. Is this a good time?

MR. DOSS: It is.

THE COURT: All right. Folks, leave your pads. Lunch should be arriving shortly. Thank you very much. We'll be back in 1:15.

(A lunch recess was held.)

THE COURT: Do we need to take something up? All right. If there is nothing further, bring in the jury.

(Jury present)

COURT SECURITY: The jury's in the box, Your Honor.

THE COURT: Let the record so reflect. Everyone please be seated. Mr. Doss.

MR. DOSS: I would call Isaac Sheppard to the stand.

(Witness sworn)

THE COURT: All right. Sir, you can take a [548] seat and make sure that you speak directly into the microphone.

THE WITNESS: Okay.

WHEREUPON, ISAAC SHEPPARD,
having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. DOSS:

Q. Please state your name for the record.

A. Isaac Sheppard.

Q. And can you tell us where you live?

A. I live at 754 Maplewood Circle in Ensley.

Q. How are you employed?

A. I'm retired.

Q. And what did you do before you retired?

A. I was — worked for the post office.

Q. Okay. Do you know Timothy Hurst?

A. Yes.

Q. How do you know Timothy Hurst?

A. Well, when Timothy was about — around ten, my wife and I conducted Bible studies with him and his siblings.

Q. Okay. Where were those conducted?

A. At his home.

Q. And explain to me how that works.

[549] A. Well, actually, we have publications that we study from, and one of the publications that we use was one of the most basic ones that we can use entitled My Book of Bible Stories, so what happens is the family, they would have their own book and they are to read the book, and then we would cover the paragraphs when we got there.

Q. Okay. How — how would Mr. Hurst do whenever you were covering those paragraphs?

A. Tim was slow. His other siblings would be able to answer the questions, but it would take Tim a little while before he could really get an answer out. You would have to more or less pull him toward the answer,

like, remember this happened or that happened, and then he would finally say, "Oh, okay."

Q. Was he ever able to progress out of that most basic book?

A. No.

Q. Was this any — any preparation required by family members before you — before you came to their home?

A. Yes, yes, yes, they were required — as a matter of fact, the book itself not only had paragraphs, but also Bible scriptures that they had to look up and see how it harmonized with the paragraphs.

Q. Was Mr. Hurst able to do that?

A. No.

[550] Q. Was that from a lack of trying?

A. No, he — he would try, but I think his — Mr. Hurst showed — he was not able to comprehend, especially when we started reading scriptures, he was — no, he couldn't comprehend all of that.

Q. Was part of the — was there ever a time whenever Mr. Hurst would be required to read in front of anybody else?

A. Oh, yes. Everyone — as a matter of fact, when they were called on to give a answer, I always would ask them to back it up with a scripture, but Mr. Hurst could not — he had a problem reading, and he was embarrassed so he would shy back from that.

Q. Did it seem like — strike that.

The younger — the younger siblings, were they able to understand the things that you were teaching?

A. Oh, yeah, they caught on fast. They were more apt to answer from the paragraph and from the scripture, they were — they were — they had no problems with that.

Q. If you had to compare the younger siblings' performance with Mr. Hurst, how would you characterize that?

A. I would characterize them — from a scale of one to ten?

Q. Uh-huh.

A. I would say he was about an eight and he was [551] about a five.

Q. Now, was there — was there ever — come a point in time when the family was supposed to do the scripture reading in front of the congregation?

A. Oh, yes.

Q. How does that work?

A. Well, first of all, we have what we call a demographic ministry school and it's a school designed to help you to be able to present a Bible topic, and the only one in the family that wasn't on the school was Tim.

Q. Why was that?

A. He declined. He declined to be on the school.

Q. Do you know why?

A. Well, as I stated before, Tim had a reading problem, so he — and him being a shy person, he wouldn't do it.

Q. Could — whenever you would ask questions, would Mr. Hurst be able to elaborate his answer beyond a mere yes or no?

A. No.

Q. If you asked specific questions of Mr. Hurst, would he be able to respond as opposed to general questions?

A. A specific question, yes, if he understood it. If not, he would — he would shake his head, he wouldn't understand.

[552] Q. How would you describe his personality?

A. Tim is a very shy, loveable person. He's a fun-loving person. He likes to play jokes, kid around. He's just a mild-tempered person.

Q. How would you characterize his maturity level, as compared to that of his siblings?

A. Well, I can only speak for, as far as studying with him at the basic study, so I would say that he was — he was below his siblings as far as that was concerned, but as far as — I couldn't answer on anything else. But as far as what I know from studying with him, then, you know, he was below his siblings.

Q. Okay. How long was it that — how long a period of time was it that you — that you went to the Hurst home and that you were involved with that family?

A. I think from when he was 10 to about 16.

MR. DOSS: No other questions, sir.

CROSS-EXAMINATION

BY MR. MOLCHAN:

Q. Sir, basically, you interacted with him for a period of about six years?

A. Yes.

Q. And it's your testimony basically that the two other boys, his brothers, they read and comprehended at a much higher level than he did?

[553] A. Yes.

Q. No question about it?

A. No question about it.

Q. Now, in this type of scripture reading and talking about, you know, God and how everything correlates within your scripture, could you tell if Tim got it? I mean, did he understand the concepts of right and wrong, and God and things like that?

A. As far as that's concerned, yes.

Q. There wasn't any problem with that?

A. No, he understands what was right or wrong.

Q. His problem was really with the technical aspects of scripture, the language portion of it, would you say that is the primary issue that he had?

A. Yes.

MR. MOLCHAN: No other questions.

THE COURT: Anything further?

MR. DOSS: No redirect, Judge.

THE COURT: You may step down.

MR. DOSS: The defense would call Mr. Calvin Harris.

(Witness sworn)

THE COURT: Go ahead and take a seat, sir.

WHEREUPON, CALVIN HARRIS,

having been first duly sworn, was examined and testified as [554] follows:

DIRECT EXAMINATION

BY MR. DOSS:

Q. State your name for the record, please.

A. Calvin Harris.

Q. Mr. Harris, how are you employed?

A. I'm a retired high school administrator.

Q. What did you do as a high school administrator?

A. Just about everything. I dealt with discipline, dealt with the facilities, sports. You name it, I did it.

Q. What was your title?

A. Administrator in charge of facility and athletics.

Q. That was where at?

A. Tate High School.

Q. How many years did you do that?

A. For 16 years I was the administrator dean there. Then after that, 13 years as an assistant principal.

Q. Okay. During that period of time, did you come to know Tim Hurst?

A. Yes, I did.

Q. Did you have — did you come into regular contact with Mr. Hurst?

[555] A. Yes, I did.

Q. How did you end — how would it come about that you would come into contact with Mr. Hurst?

A. Well, Mr. Hurst didn't like going to class, and part of the problem was Tim was low functioning. He would get in a regular class and he wouldn't understand what was going on, and what he would do, he would go to homeroom and he didn't realize later on that day the teachers would send us an out-of-class slip and most of the time when we find him, he's down in the gymnasium playing basketball and most of the coaches knew that his academics wasn't up to par. Tim really should have been in special education.

Q. Now, as far as — as how Tim related to other kids, describe that for me.

A. Well, he related to them well, always playful, he's always playful. Tim was never disrespectful. Anytime we got him in the office, he'd talk to us and we'd try to talk to him and try to straighten him out to say, "You got to go to class, and you can't skip class all the time," and he would go, he would go to class sometimes, but if he gets in his mind that he's not going to go to class, he would head straight to the gymnasium to play basketball.

Q. You said you had conversations with him. Did he ever seem to really get it, to really understand what it was you were trying to convey?

[556] A. We tried to convey to him that the only way that you're going to get a high school diploma is that you have to go to class. And after he made it to Tate High School in the 9th grade, we took and looked at his records and saw that he was socially promoted from middle school. And once you get social promoted to middle school, it's just like they move them on. We have so many kids that get socially promoted and when they get to high school, they fall through the cracks and they need to be in another program.

When Tim was there, we used to have a program that we would send those kids that was academically impaired, we would send them to George Stone, but the thing about George Stone you had to pass a tape test; it was simple math and English, and we knew Tim could not pass that test. If he could have passed the test, they'd have got him his GED, plus got him a trade.

Q. But he couldn't pass the test?

A. He couldn't pass the test.

Q. Can you explain to us what a HSET test is?

A. It's the high school equivalency test. Back then it was real simple. It was simple. It's nothing like the FCAT, where you have the kids talk about the FCAT and when they come home and say, "Hey, man, that FCAT was hard."

The HSET was real simple, and Tim did not pass [557] it either time.

Q. How many times did he take it?

A. Twice.

Q. What percentage of students pass that test on the first try?

A. About 80 percent.

Q. What about the second try?

A. The second try out of that 20 percent, I would say about 12 percent of them.

Q. About how many — about how many students never pass that test?

A. Probably 3 to 5 percent.

Q. How would you describe Mr. Hurst's maturity level compared to the other students that you had there at Tate High School?

A. Tim matured his level, I'd say probably on the 5th, 6th, 7th grade maturity. Like I say, he played a lot. He didn't pay attention to what he was doing, and when he went to class, he was — I walked the campus a lot. A lot of times I would see him sitting in the back of the classroom. A lot of time I see him walking down the corridor when the bell ring, he has no materials in his hands, like books or papers to go to class.

Q. Would you — would you characterize Mr. Hurst as being a leader or follower?

[558] A. A follower.

Q. Did you ever see any of the other kids pick on him because of his intellectual abilities?

A. No, they didn't pick on him. He got along with them well.

Q. Whenever — whenever you would — whenever you would speak with Mr. Hurst, did it ever seem like you were able to get past the basic conversation with him, understanding and then moving to another level to where you would be talking about a different subject or topic?

A. You would have to keep it really simple for Tim, because if you moved to another level, he wouldn't understand what you were talking about.

MR. DOSS: No other questions, Judge.

CROSS-EXAMINATION

BY MR. MOLCHAN:

Q. Mr. Harris, isn't it true there, unfortunately, in our school system, you've seen —

A. Many of them. Many of them fall through the crack.

Q. There are a lot of folks in Tim Hurst's shoes?

A. Yes, sir. Yes, sir.

MR. MOLCHAN: Thank you very much.

THE COURT: May he be excused?

MR. DOSS: Yes, Judge.

[559] THE COURT: Thank you, sir. Mr. Doss.

MR. DOSS: Call Mr. Jerome Chism.

(Witness sworn)

WHEREUPON, JEROME CHISM
having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. DOSS:

Q. Please state your name for the record.

A. Jerome Chism.

Q. Mr. Chism, where do you work?

A. East Charter School.

Q. What's your position there?

A. Principal.

Q. What did you do before you worked in education?

A. I was a major in the military, U.S. Army.

Q. How long have you been the principal there at Escambia Charter School?

A. About 13 years now.

Q. Do you know Timothy Hurst?

A. Yes, I do.

Q. How do you know him?

A. As a student at the school.

Q. And what kind of students do you have there at [560] Escambia Charter School?

A. We have a composite list of students, some of them are — during that time when Tim was there, mainly came as a referral from the district.

Q. What would the referral be for?

A. Students that are academically low achievers or behavioral problems.

Q. Now, when you got — when you had Mr. Hurst, what would bring you into contact with Mr. Hurst?

A. Relatively small school. I think during that time frame when I had Tim there, I was a coordinator for that program and we had approximately about 30-some kids, so I saw him on a day-to-day basis.

Q. And how would you characterize his behavior?

A. Child-like, more during that time frame, Tim was in his teens. If my memory serves me correctly, he was probably 18 or 19 somewhere in there, and he was more like a 12, 13 year old.

Q. Okay. Would you — would you end up having to — having to discipline him because of inappropriate behavior?

A. A lot of times, yes, sir. As a matter of fact, I can recall when I had to go off to meetings, I would take Tim and put him in the office along with the secretary because of the fact that he was going to act out and because [561] if he got around other kids, nine times out of ten he was going to be off task.

Q. Okay. Okay. So would you characterize him as a leader or follower?

A. More so a follower.

Q. Was he able to — was Mr. Hurst able to — to realize the appropriateness of how to conduct himself in different situations?

A. Probably in some things, but more likely, I would say his attention span was probably 59 1/2 seconds. You could tell him one thing, he may pick up on it and then again it goes back to what he knows best.

Q. Did — maybe — as far as being able to conduct himself, would he be someone who would be able to change his behavior as he moved from, like, say, from the playground or gym class to regular class to different social situations that required different behavior?

A. No, sir. I think he felt more comfortable on the playground because basketball was probably his thing during that time frame. As long as he was playing basketball, he was happy.

Q. Now, was Mr. Hurst ever teased by other kids?

A. Quite often.

Q. Can you — can you describe that to us?

A. I can recall there was one incident where some [562] kids had a caricature of a gorilla, and Tim was sit-

ting there and they passed the gorilla next to the caricature, and they would ask which one was Tim.

Q. Did they ever tease him about his intellectual slowness, deficits?

A. Somewhat, but not as much as the caricature.

Q. Are you familiar with Lee-Lee Smith?

A. Vaguely.

Q. Did you ever meet Lee-Lee Smith in the presence of Mr. Hurst?

A. A few times he came and picked up Tim from school. And then oftentimes I would hear in conversation Tim would talk about him.

Q. Did it seem — as far as what you observed of the relationship, which one seemed to be the leader and which one seemed to be the follower?

A. It would definitely be Mr. Smith would probably be more than the leader than Tim was. When Tim spoke about him, it was almost in aberration, really.

Q. Do you think that Mr. Hurst would be able to do something like fill out a job application by himself?

A. Probably his name and maybe his date of birth, but as you get into terms of employment — length of employment or job description, things like that, I would say no.

[563] Q. You were a major in the U.S. Army. Do you think he would be able to get into the Army?

A. Oh, no, sir.

Q. Why is that?

A. I don't think he would actually do well on the ASFAB.

MR. DOSS: No further questions, Judge.

CROSS-EXAMINATION

BY MR. MOLCHAN:

Q. When the talked about the caricature situation with the gorilla, how did he react to that?

A. He was a little bit angry, you know, because all the kids in the classroom were laughing at him, but it was not a fact where he was violent or anything like that.

Q. Angry, but not violent?

A. Correct.

Q. He maintained his —

A. His decorum.

Q. — his control?

A. Yes, sir. Yes, sir.

MR. MOLCHAN: No other questions.

MR. DOSS: None. Thank you.

THE COURT: May he be excused?

MR. DOSS: Yes, Judge.

THE COURT: Thank you, sir. Mr. Doss.

[564] MR. DOSS: I don't have any until Dr. Wu this afternoon, Judge.

THE COURT: Folks, as I explained to you sometimes trials take on a life of their own. In this sense, we had expressed on Monday that we knew that we had a little bit of a witness problem, that's why we were going to stay late this evening. We went faster this morn-

ing than we were anticipating, so we aren't going to pick up with the doctor's testimony until 4:30.

I think it would be an awful thing for me to do to leave you back in the back for two and a half hours. What I'm going to do is release you, and ask you if you would return no later than 4:15.

Same thing, go to jury management, second floor, they will get you up. Just leave your note pads, we'll take care of them. See you at 4:15.

(Jury out)

THE COURT: All right. We'll be in recess until 4:15 for you folks because we just want to make sure that everything is working properly.

(A recess was held.)

THE COURT: I think they are getting the jury right now, so we'll just have to wait and see.

This is off the record.

[565] (A discussion was held off the record.)

THE COURT: Let's put this on the record. Do you want me to make any sort of a statement about why we are doing this?

MR. DOSS: I don't — I don't think so, Judge.

THE COURT: Okay. But we said that they — we had some witness issues, so I think they will figure out that —

MR. MOLCHAN: I don't see —

MR. DOSS: I think they will realize the gentleman —

THE COURT: Normally — I mean, this is a little bit of a hybrid situation. Normally if we're reading

depositions or we're seeing some sort of a recording, I usually say, give it the same weight. Do you want me to say —

MR. DOSS: We could probably say that.

THE COURT: I can say, this is a little bit unusual because he's, you know, appearing by video — I won't even say unusual — but he is appearing by video, but you will give him the same weight as if he were here in person.

MR. DOSS: Judge him by the same standards as everybody else.

MR. MOLCHAN: That's fine.

[566] COURT SECURITY: I believe the jury is here.

THE COURT: All right. Bring them in.

(Jury present)

COURT SECURITY: The jury's in the box, Your Honor.

THE COURT: Let the record so reflect. Everyone please be seated. Thank you, folks, for coming back promptly. All right.

Mr. Doss, call your next witness.

MR. DOSS: Dr. Joseph Wu.

THE COURT: Mr. Wu — Dr. Wu is going to be appearing through a video conference system, but you are to judge his testimony by the same standards that you would judge the other witnesses, as if he were actually here physically testifying in person.

Give me just a moment because we have had some camera difficulties.

Dr. Wu, can you hear me? This is Judge Nobles.

THE WITNESS: Yes, I can hear you fine. Thank you.

THE COURT: Please raise you right hand.

(Witness sworn)

THE COURT: All right. Thank you. Mr. Doss, you may proceed.

[567] MR. DOSS: Thank you, Judge.

(Conclusion of Volume III)

IN THE CIRCUIT COURT
IN AND FOR ESCAMBIA COUNTY, FLORIDA

STATE OF FLORIDA,

vs.

TIMOTHY HURST,
Defendant

CASE NO: 1998-CF-001795

RESENTENCING HEARING
TRANSCRIPT OF PROCEEDINGS

VOLUME IV

* * *

[573] (Continuation of proceedings held 3/7/12)

WHEREUPON, JOSEPH WU, M.D., having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. DOSS:

Q. Would you please state your name for the record.

A. I can't hear you very well, Mr. Doss.

Q. He's moving the mic up closer.

A. Okay.

Q. Would you please state your name for the record.

A. Yes. Your voice is still a little faint, but I can make it out with some difficulty.

Q. How about now?

A. Oh, yes, now it's much better. Thank you.

Q. So would you state your name for the record, please.

A. Yes. My name is Joseph Ton Wu.

Q. And, Dr. Wu, how — how are you employed?

A. I'm employed at the University of California of Irvine College of Medicine, Brain Imaging Center as a clinical director. I'm also an associate professor in the Department of Psychiatry and Behavior at the College of [574] Medicine.

Q. Dr. Wu, have you prepared a PowerPoint to assist us with your testimony today?

A. Yes, I have.

Q. All right. I've got it — I know you can't see it, but I have it pulled up on the screen here and as we go through the testimony, if you could just tell me each time we need to move to the next — to the next screen; okay?

A. Yes.

Q. Now, as far as — as your qualifications to do what it is that you do, could you relate that to us, please.

A. Yes, I have — I did my premedical education at Stanford University; I graduated from there with honors in 1978. I then went to medical school and obtained my M.D. with honors in 1982. After that I did a residency in psychiatry, which I completed in 1986 with

honors. After that I did a fellowship in brain imaging, which I completed in 1988. Since that time I have been an associate professor and — and I have become an associate professor and clinical director of the University of California Brain Imaging Center where I have published over a 15 peer review articles on use of PET scanning in the area of neuropsychiatric disorders including studies on traumatic brain injury, schizophrenia, hypoxia, bipolar disorder, cocaine addiction [575] as well.

Q. Explain to the jury what a peer review article is?

A. Yes, a peer review article means that the articles that I have published on the use of PET scan in the area of neurological and psychiatric disorders have been reviewed by other clinical doctors or scientists who are knowledgeable in publishing it and who have deemed the articles that I have written to be scientific and medically sound and worthy of being published.

This is the way the medical field tries to do quality-control checks to have independent doctors and scientists review articles prior to publication to make sure they are scientifically and medically sound.

Q. Have you received federal funding for your work?

A. Yes, I received over a million dollars, not me personally, but the University of California Irvine had obtained funding in excess of a million dollars in the area of brain scans, especially PET scans in the study of psychiatric disorders such as depression, so I have also received funding from pharmaceutical firms and from foundations to do PET scan studies in the area of neurological psychiatric disorders.

Q. As far as — what I was doing, I just moved to [576] the second slide that you had given me.

As far as the UCI Brain Imaging Center, how long has it been in operation?

A. We have been in operation for almost 30 years. And we are one of the leading centers in the country for the use of PET scans in neurological and psychiatric disorders.

We have published over 50 peer review articles, and we have been involved in numerous research grants from both the federal government, pharmaceutical firms and foundations to look at PET scans in the study of various types of neurological and psychiatric disorders, including Alzheimer's disease, schizophrenia, depression.

And as the clinical director of the Brain Imaging Center, I have also been asked by the Congressional Directed Medical Research Program to be a reviewer to look at use of brain imaging to assist in the assessment of returning veterans from Iraq and Afghanistan who have sustained traumatic brain injury.

I have assisted the federal government as a reviewer to determine how brain imaging can be utilized in terms of assisting in the assessment of our returning troopers.

Q. Moving to the next slide. Can you explain what a traumatic brain injury is?

A. Yes, a traumatic brain injury is called a [577] silent epidemic and it is one of the leading causes of disability among adults. And it is unfortunately very common, and it is a leading cause of deaths for individuals as well and probably some of the most common forms of trauma to the head, which is permanent damage to

cognition and emotional processing include accidents or injuries, such as from motor vehicle crashes.

Q. How — is it a problem as far as a lot of people being hospitalized, as far as these traumatic brain injuries?

A. It is a very common source of hospitalization. I would say that at least a half million people a year are hospitalized with traumatic brain injury and many more are injured who have never been hospitalized. So I would say only a minority of people with traumatic brain injury have received proper medical care. This is unfortunately a very common problem which has been under diagnosed and under treated.

Q. Moving to the next slide, to the traumatic brain injuries causes, I think you had already touched upon that. So, as far as the slide regarding mild traumatic brain injury, what's that associated with?

A. Well, mild traumatic brain injury is associated with a number of different causes including motor vehicle accidents, falls, being assaulted, [578] sports/ recreational injuries.

And if you go to the next slide, please. It's associated with impairment in cognition such as poor memory, difficulty with attention, and it's oftentimes quite debilitating.

There are a significant number of people who never fully recover from a mild traumatic head injury. Although most people recover, there is some — by some estimate a minimum minority of approximately 10 percent of the population would have permanent damage in terms of their brain functioning after a concussion or, quote, mild traumatic brain injury, so in a way the mild traumatic brain injury is kind of a misnomer because it,

I think, understates the potential long-term life kind of consequences that can result.

Q. Now, I think we're on a different slide, Doctor.

I'm on the slide with the — compares the PET and the MRI. Can you move to —

A. Oh, yes, yeah, okay. So — now, one of the best way to try to access in an individual with suspected brain damage is with PET scans.

MRI or CT scans are oftentimes very inaccurate and insensitive at diagnosing many different types of neurological or psychiatric problems that steem [579] from abnormal brain functioning.

We know, for example, that in cases of — like someone who is in a coma, you can have a normal MRI scan even with someone who is comatose but the PET scan with show significant abnormalities, significant lower overall activities.

You can even have a normal MRI scan for someone who is deceased because their brain structure may be intact even though a PET scan would show zero functioning.

So a PET scan is much more sensitive and accurate in detecting many different kinds of brain abnormalities than a MRI or CT scans.

Q. Within the comparison slide that you have here as far as the PET scan and the MRIs, what is the significance of each one of these slides?

A. Well, these slides shows comparable levels of the brain. The top two slides show a PET scan and a MRI scan that is high up in the brain.

The middle slide shows a PET scan and MRI scan to the middle of the brain, and the bottom slide shows a PET scan and MRI of the bottom of the brain.

The PET scan is color coded. So the areas of the brain that consume a lot of sugar are color coded hot colors, like red. And the area of the brain that are — are not as active, but still more active than average, would be [580] color coded yellow.

Areas of the brain that are less active are color coded green. And areas of the brain that are very low active are color coded blue.

So we can look at how much functioning or activities there is in different areas of the brain with PET scans, whereas a MRI scan shows the shape of the brain, but it doesn't show any structure.

So as previously mentioned, you can have a MRI scan would show the shape of the brain, which can be perfectly normal because the shape of the brain of a cadaver may be perfectly normal, even though there is a grossly abnormal function, which will be detected by much lower level activities in terms of the brain would have with them, either aqua green and blue and lot less red and yellow, or in the case of someone — a cadaver, no activity whatsoever.

Q. As far as going to the next slide, can you tell us now — now this PET scan works?

A. Yes. A PET scan works by something called a positron. A positron is short for positive electron.

Electronics in our universe normally have a negative charge. Now, we can create a kind of electronic that is a positive charge. This would be called the antimatter version of an electronic, identical every way

except instead of a negative charge, it has a positive [581] charge.

Now, the advantage of having created an antimatter version of electron, a positive electron is that when you attach it to a regular electron, you can get energy raised which comes out which you can detect with a scanner. We can attach a positron emitter to a sugar molecule, inject it into a patient and then the brain will use sugar as its main fuel. It's an area of the brain that is more active or accumulates more sugar, they'll be more positron emitters in that part of the brain.

A positive electron combined with negative electronics, they will create energy rays which come out of the person's — the patient's brain which are detected.

Now, this combination of positive electrons and negative electrons create energy rays was described in a famous equation by Einstein in which he said E equals MC square. E equals the energy in an electron and a positron, and so basically what happens, we are able to convert the electron and positron into energy rays.

For those of you who are science fiction fans, you may remember the show Star Trek in which the USS Enterprise was powered by an natural antimatter engine. Though that show is science fiction, the basics of physics principal, that's a combination of matter and antimatter creates tremendous energy is, in fact, a well recognized and [582] accepted physics principal and is a fundamental principal that underlies PET scanning.

Q. As far as the — moving to the next slide, can you describe for us what we're looking at here as far as the normal control and the orbital frontal lobe syndrome?

A. Yes, this is a example of a three dimensional rendered view of a PET scan of a brain-injured subject versus a normal control subject.

This is a teaching slide which I use on how to illustrate some of the differences between a brain injured PET scan and a normal control.

What we're seeing is a normal control subject on the right side shows more activity so more yellow activity where the red arrow is, whereas a brain-injured subject shows less activity and is colder and it shows more dark blue which is indicative of lower metabolism in that part of the frontal lobe.

This is an example of a brain-injured subject which has decreased function activity color coded in the base of the frontal lobe as compared to that of a normal controlled subject.

Q. Going to the next slide, what are we — what do we see as far as the normal — the normal CT MRI, as opposed to the decreased frontal activity when you have brain trauma?

[583] A. Basically, PET scans are much more sensitive than CT and MRI scans. You can have a subject with a brain abnormality with different kind of brain injuries, who is normal CAT scan, normal MRI scan, what they would show is decreased frontal activity on the brain scan. So this is something that has been shown scientifically over and over again. This is just one example of — would be in a medical publication that has shown this is an accepted fact in the scientific and medical literature.

Q. Now, moving to the following slide, have there been peer review articles regarding this?

A. Yes, so these are some other peer review articles. I haven't brought every article, but these are just typical of the kind of scientific medical articles that have been published which shows that PET scans are well recognized methods for detecting abnormalities, even when MRI and CT scans are perfectly normal in patients who have some type of brain injury.

Q. Okay. Now, as far as the following slide that's entitled PET scans, can you tell us how it demonstrates regional brain function?

A. Well, the way a PET scan measures regional brain activity is that the — look at sugar consumption.

Sugar is kind of to the brain what gasoline is to a car engine. So if you have a car engine that is [584] burning a lot of gasoline that is very active, if there is a part of the brain that is very active, just like a car that consumes a lot of gasoline, that part of the brain will consume a lot of sugar. On the other hand, if you have an engine that is idling and not being very active, it will not consume very much gasoline. The same is true for the brain.

If you have some areas of the brain that is not very active, they will not consume as much as sugar. Basically, what we're looking at, different functions of the brain in different regions and measuring sugar consumption in these areas with this type of radioactive positron image or molecular to allow us to measure how much activity is going on in different regions.

Q. Moving to the next screen, you have a picture here, what is the picture of?

A. Now, this is how we make the positron emitter. This is something called a cyclotron. A cyclotron is — if we go to the next slide, please.

A cyclotron is a 22-ton instrument that's as heavy as 11 cars but it fits into a space of maybe two cars. It can take particles smaller than an Adam, so subatomic particles, similar to almost the speed of light.

Light travels at approximately 186,000 miles per second. A cyclotron can speed particles more than an Adam to almost 186,000-miles per second and they can bombard [585] a target with these small-like atomic bullets. These atomic bullets, once they bombard a target, can create the positron emitter which we can attach to a sugar molecule.

Now, we go to the next slide, please.

Q. Okay.

A. The next slide, if you lift up the hood of the cyclotron engine and look at the engine, this is what you see inside. You see these two triangular magnets.

And if we move to the next slide please, the next slide should show a schematic diagram which shows these two triangular magnets. You see a spiral that is made of dotted lines.

What happens is that the magnets either attract or repel charged particles. You take a small particle and you charge it. And then if it's a positively-charged particle, you make a magnet positive or pallet, if you make the other magnet negatively charged, it will attract it. You alternate how you charge the magnet. This will either repel or charge the positive — the particle with each revolution, the particle is going faster and faster.

It's kind of like having a merry-go-round in a playground, where you stop the merry-go-round with your hand and pretty soon you're able to get that merry-go-round to go faster and faster.

[586] By the time the bullet emerges from the target, it's going at almost 186,000 miles per second, 99.99 percent the speed of light and then once it bombards the target, recreates the positron emitter, which doesn't exist in nature, and we're able to attach to a sugar molecule.

And so we move on to the next slide, please. The next slide is — basically says that we take the compound which is called Fluorene 18, which we have made in the cyclotron and we attach it to sugar.

Now, as I said previously, sugar, sugar like compounds called FDG is the main fuel for the brain, like gas is for an engine.

We can attach a positron emitter to the sugar molecule kind of like a dye.

We move on to the next slide please. The next slide, you'll see a radiochemist. A radiochemist is taking the Fluorene 18, which is created in the cyclotron and he's attaching it to sugar molecule in this hard cell. He's looking through this tube-like thing, beveled-glass window which shields him from the radiation from the positron emitter and using robotic manipulators to attach the sugar molecule to the positron emitter and after it's attached, kind of like attaching a dye to a sugar molecule, radioactive dye, we then inject it into the patient.

[587] If we can have the next slide, please. So the way we introduce the positron tag sugar molecule into a patient is through a small plastic tube called an intravenous line.

If we can have the next slide, please. So here we see an example of a model. A model is getting a small

plastic tube, an intravenous line being placed in his arm.

And then we can have the next slide, please. The next slide we see the radioactive sugar molecule, which has a positron emitter which is created by cyclotron which is attached in the hot cell being injected into the patient through the small plastic tube, the intravenous line.

In the next slide, please. We then have the patient doing a simple computer task called a visual task where there are red numbers that appear on the screen and every time a zero appears on the screen, we are asked that you press a button. This is a very simple task. We monitor the subjects and make sure they can understand the task and do prepping.

And this allows us to get a more accurate scan that is more sensitive for detecting brain injury than a typical PET scan, the way it's normally done.

The way that PET scans are normally done by most facilities, most facilities do PET scan primarily to [588] look at cancers. So for cancer, the way you do a cancer PET scan, you basically have the patient lie on the bed and you inject them but that's not as good for detecting more suttle abnormalities in the brain.

For detecting more suttle abnormalities in the brain, having the subject press a button whenever a zero comes on the screen is kind of like a treadmill stress test for the heart.

If you had someone who has a suspected heart disease, you can get a resting EKG where it might miss the heart disease. But if you had to go on a treadmill stress test and run, while the EKG with the heart, you're going to have an much more accurate diagnosis

of heart problems than if you just had — make the heart EKG while the person is resting.

This is kind of like a treadmill stress test for the brain which would get a much more accurate diagnosis and much more sensitive for detecting a brain injury than we would if we did — just did it the way most centers do, which is just having them lying on the bed resting. It would be like going to a cardiologist who only gets a resting EKG. If you have a big heart problem, you might still detect it with a resting study, but it's not going to be as accurate of detecting more — or problems that aren't really gross as this kind of activation study.

[589] So that is one of my areas of specialization is doing active PET scan for traumatic brain injury.

Now, if we can move on to the next slide, please.

Q. What does this slide show here with the person that is going in the tube?

A. After the person has done this activation treadmill stress test like, you know, pressing a button when the zero comes on the screen for 30 minutes, we then, in the tube, look at the brain scan while the subject is in the scanner, so this is kind of like developing a negative.

If you remember a camera before they all went digital, we used to have negative for a camera and we would expose negative, we would take it to a developing site and they would take the negative and develop it.

So what we're doing here basically is that the PET scan is like a giant developing tank, and what we have is a Lincoln image which is basically stored in the patient's brain, the brain trying to do this activation study

so we're basically developing the latent image in the PET scanner.

We can move to the next slide, please.

Q. What is — what is positron annihilation?

A. Well, what positron annihilation is is that the brain has taken up the sugar molecule where the positron [590] emitter, the positive electron that we made in the cyclotron which we attach to the sugar molecule, so areas of the brain are more active to have more of the sugar molecule and more of the positive electrons than antimatter in that part of the brain.

And so here you will see the E plus, which indicates the positive electron. And it is combining with all the other electrons in the brain, which are negative, and then we get — the equation is E equals MC square, an annihilation of the electrons and positrons and their transformation of pure energy. And the energy rays come out at 180 degree angle and are picked up by these crystal detectors that specifically attuned to detect energy rays emanating from the patient's head.

If we can move to the next slide, please.

Q. What is that illustrating?

A. In the PET scan, this is a schematic of a PET scan. You have thousands of these crystal detectors that are specifically tuned to detect the energy rays emanating from the patient's head after they have taken this antimatter emitting sugar molecule, and all the energy rays created by the positrons and electrons come out in a straight line.

Basically, they are a very simple analogy. We're looking at areas of the brain that have lots of [591] intersecting lines because those are the areas of the brain

that have lots of sugar molecules for which the energy rays are emanating. The areas of the brain that are less active would have fewer energy rays emanation from those parts of the brain and fewer intersecting energy ray lines coming from that part of the brain.

So sort of a laymen's language, basically looking at the concentration of the sugar, we're looking at the intersecting lines from the energy rays that the crystals detect. That in a nut cell basically is how PET scans work.

Now, we can move on to the next slide, please.

Q. One second, Dr. Wu.

MR. DOSS: Judge, I would move to have Dr. Wu declared as an expert in PET scans and their interpretation.

THE COURT: I'm sorry?

MR. MOLCHAN: I don't have any objection.

THE COURT: You don't have any objection?

MR. MOLCHAN: No.

THE COURT: So accepted.

Q. (By Mr. Doss) Dr. Wu, I'm looking at the slide that is entitled PET Scans Generally Accepted. Can you explain to us whether this is something that is generally accepted in the scientific community?

[592] A. Yes, PET scans have been generally accepted for decades as a scientific valid way of assessing brain function.

Now, there are literally thousands of scientific articles that have been published to do PET scans, metabo-

lism or function; this is something that is generally accepted by the scientific and medical community.

We can move on to the next slide, please.

Q. What are other clinical uses of PET scans?

A. The clinical uses of PET scanning includes things such as traumatic brain injury evaluation; hypoxia brain injury evaluation; evaluation of different kinds of toxic exposures, like exposure to toxic agents; Parkinson disease; epilepsy; stroke; Alzheimer's disease; schizophrenia, tumors. There are many clinical uses that PET scans can be used for.

Q. As far as the next slide, it shows two different brains. Can you explain that to us?

A. Yes. For example, Medicare reimburses PET scan facilities for doing PET scans to look at Alzheimer's disease.

So one of the things that we are showing here is an example of a PET scan of an Alzheimer's disease patient versus a normal control.

You see the Alzheimer's patient shows less red [593] and more green than the area that is labeled 5A, compared to the normal control which is labeled 5B.

Remember, the way the color scale goes red, yellow, green, and blue. So normal people have a lot more red, and the Alzheimer's disease have lot less red and a lot more of the lower, cooler colors, a lot more of the green.

This is a typical pattern of decreased activity in the brain that is Alzheimer's disease.

And we have move on to the next slide, please.

Q. Okay. What's this?

A. This is — this is another example of a PET scan that shows an age-master controlled subject compared that of an Alzheimer's diseased-patient's brain.

You can see the Alzheimer's disease patient brain shows cooler colors. You can see the color scale on the bottom; it goes red, yellow, green, blue. So the areas of the brain that are cooler, like more blue or more to the left are less active than areas that are more to the right, like in this subject, the blue is lower than the green. In these slides there, this Alzheimer's patient's brain shows less activity, cooler colors and so — so this is something again that can be helpful to confirm a diagnosis, can help clinicians in terms of figuring out what kind of medication to use for their patients.

Q. Now, as far as —

[594] A. If you go on to the next slide, please.

Q. Okay. And so when you're doing — when you're doing this, what's the benefit as far as diagnoses?

A. Well, for an example, when someone's suspected traumatic brain injury, as mentioned is some individuals who have sustained traumatic brain injury, which will be called mild, even though that's a misnomer because some cases of, quote, mild traumatic brain injury end up permanent lifelong brain damage, even though it's called mild. It's very misleading.

But these individuals oftentimes have no abnormal MRI CT scan, but it can be debilitating. It can result in significant problems with learning, concentration, memory. It can result in significant impairment in their ability to achieve academically. For example, it's not uncommon for somebody with persistent problems stemming from some kind of brain injury to have life-

long academic problems because of their impairment and their ability to learn and pay attention and process information.

Q. Dr. Wu, can you verify which slide you're on. I think we're off.

A. I'm on the slide that says mild TBI, so I have the Alzheimer's disease diagnosis.

Q. I've caught back up now.

Now, as far as the one that shows a [595] closed-head injury versus the normal control, what's that demonstrating for us there?

A. Well, this is an example of a patient who had sustained a mild traumatic brain injury, that is, you know, you don't even necessarily have to have a loss of consciousness. You can just have your bell rung, where you feel dazed and — although most people who have their bell rung, who feel dazed, after a head injury will recover.

Some minority of individuals, 10 percent of individuals will have permanent damage from these kind of, quote, mild closed-head injury. So this is an individual with a, quote, mild closed-head injury, who never had a significant reduction in a frontal lobe function activity. You will see the area there with 1A, which shows much less sugar metabolism than the normal controlled subject in the area labeled 1B.

Q. Now, on the next slide that says mild TB — it's on — I'm sorry.

A. I think that one —

Q. Is it clinical —

A. I think that one — these are repetition. We can skip the next two.

Q. As far as the clinically significant asymmetry in the brain metabolism, can you explain what that is?

A. One of the ways of determining if a brain is [596] abnormal, one of the — it's to look at how different one side of the brain is from another side. So the human brain is kind of like the human face, the human face is not perfectly symmetrical but it's symmetrical enough.

So if you had a significant alteration on one side, like a significant eyelid droop or a lift droop compared to the other side, this would signify that there is some abnormality.

Even the brain is not perfectly symmetrical, it's symmetrical enough. The same is true with the brain.

One way we look at the brain — whether or not they are clinical significant differences between the right and left side of the brain. This is an example.

If you go to the next slide where there is one side of the brain that shows more blue and so — if you were to impose an imaginary clock face on the left-hand side and you look at the area that would be around 9 o'clock versus the area that would be around 3 o'clock, the area around 9 o'clock shows a much more kind of blue, kind of notch compared to the area that goes all the way out to the edge where the area is around 3 o'clock, you don't see a blue notch that goes all the way out to the end of the brain, you see kind of like a yellow rim. You see the area around 9 o'clock has lost that area rim. So lost of that area rim, you can see this on the other side, too, right around [597] 9 o'clock and 3 o'clock. There is an area that is kind of a lot of loss of that yellow rim,

and this is a — where the other slide shows a yellow rim present.

This is an example of a clinically significant asymmetry or a difference between a right and left side in this brain injury subject.

This is just some of the ways we try to assess brain abnormalities, that is looking at these kinds of principals or rules.

Q. Now, as far as the slide regarding traumatic brain injury imaging, I think that we've covered that, as far as —

A. Yes, we can skip over that slide because I think we have already covered that material.

Q. Now, as far as whenever someone receives some kind of brain injury, can you detect it years later?

A. Yes. So peer reviewed medical articles have been published to show that PET scans can detect injuries even if they occurred years earlier, and so this is accepted in the medical community is that you don't have to have a PET scan right after the injury. As long as the person has persistent cognitive or emotional dysfunction or abnormalities, then they are likely to show persistent brain functional, brain imaging abnormalities.

This is just to indicate that a PET scan can [598] be used to look at brain injury that occurred years prior, as long as that person has some evidence of abnormal functioning to determine the cognitive or emotion.

Q. Now, going to the next slide, can you have a mild brain injury without any contact?

A. Yes, so you can have a permanent brain damage without even, as I say, having the head strike physical-

ly. We call it rapid acceleration/deceleration. So if you had your head whipped about, just a sudden acceleration/deceleration can cause significant brain damage.

Again, this is something that has been published and is accepted in scientific and medical literature. You don't necessarily have to even have your head — be struck or strike an object to have permanent brain damage. It can be sufficient to have a rapid acceleration/deceleration.

Q. Now, as far as the traumatic — I think we have got the traumatic brain injury imaging, what do these PET scans often show?

A. Well, the most common finding in patients where some history of traumatic brain injury is some type of frontal or temporal lobe abnormalities. The frontal or temporal areas are areas of the brain that are very vulnerable and are commonly seen as showing abnormalities [599] after some type of persistent brain damage. And oftentimes, we see what we call an occipital increase, that is, the back of the brain is — so occipital lobe area that is relatively more active than the front of the brain. This is something that can be correlated with neuro-psych testing. That's something that has been written about in millions of textbooks, including a chapter that I wrote about in a major textbook.

Q. Now, what about the use of — I think you — the next slide just shows the textbook, would that be correct?

A. Well, these are other textbooks by other authors, besides me, that shows that PET scans are accepted as a way of accessing mild traumatic brain injury. This is not something that is considered unusual or

junk science. This is something that is considered an accepted valid message of assessing brain function.

Q. Now, as far as a PET report, what is that?

A. Well, a PET report describes the kind of abnormalities that one can see on the PET scan.

Now, a PET report will — is not a specifically diagnostic test, and so the best metaphor that I can think of is if you have someone who is suspected of having pneumonia, you can check their temperature and if their temperature is elevated, you would say this would [600] corroborate your impression as someone has pneumonia, they're febrile, but you wouldn't make a diagnosis of pneumonia just because of an elevated temperature.

So in some sense, a PET scan is kind of like a fancy thermometer. It tells you that there are things that are corroborative, but you wouldn't make a diagnosis of a specific disease with a PET scan to any more than you would make a diagnosis of, say, pneumonia, per se, from an elevated temperature.

These are tests that can help a doctor have more confidence in a clinical assessment, where something that is going on is abnormal. But, you know, when a doctor evaluates a patient, they have to look at many different pieces of evidence.

So a PET scan is one piece of evidence, but it by itself is not a definitive tool that will make a specific diagnosis.

Q. What is a clinical correlation report?

A. Well, a clinical correlation report is basically one — one has to correlate the information in a PET scan with other, you know, sources of information. So

things that can be done are to look at a patient's history and look at when he started to have symptoms, you say cognitive or emotional problems, find out what factors might have caused cognitive or emotional problems, like, whether **[601]** they're under any kind of history from head trauma from being injured, say, or whether or not there are any kind of toxic exposure, whether or not there is some kind of other types of environmental or genetic factors that could have resulted in this, and one can also correlate these with other types of neuropsychological testing.

So this is, basically, to say that you can't take a PET scan by itself, in terms of assessing a patient, but it is a valuable piece of the puzzle, but it's simply a piece of puzzle. You have to look at all the other pieces in order to really come up with a better specific diagnosis for a given patient.

Q. Now, as far as the next — going to the next slide, I think we have —

A. I think we have covered this.

PET scans can show injuries even when it occurred years earlier. This is just another article. I don't think we have to go in depth with this slide here.

Q. Well, let's move to the Timothy Hurst findings.

A. Yes, okay.

Q. Did you — let me ask you a couple things before we go to the slide. Did you have an occasion to come and administer a PET scan to Timothy Hurst?

A. Yes. I flew out and was present at **[602]** Mr. Timothy Hurst's PET scan and took the PET scan back with me to interpret it in California.

Q. That was at a qualified center?

A. Yes, that was at a qualified center, that is correct.

Q. What did you — what did you find from analyzing that PET scan of Mr. Timothy Hurst?

A. Well, the findings that Mr. Timothy Hurst shows that the study was good technically, that is, that there are different sources of artifactual errors that could be present but were not present in his case. So I looked for evidence of, like, emotional artifact or inadequate dozing or other things.

And the scan is a good quality scan, so there is no problems in terms of artifacts or problems with the acquisition of the scan.

Now, there are several abnormalities with his scan. One of them is a decreased, what we call cortical cerebellum metabolic rate, that is the overall regions show a relative decrease in activity compared to another part of the brain called the cerebellum, which is a small part of the brain in the back, so this is showing that there is wide-spread damage to his brain is the cortical region. So the overall brain compared to the cerebellum and specifically, there are even greater problems in what we [603] call the ventricle frontal lobe area.

Ventricle is a medical term meaning near the base of the brain, near the floor of the brain. In the floor of the brain, we have what we call a hypo-frontal pattern — that is, hypo means low. And so the floor of the brain, the ventricle area, there is less frontal lobe activity compared to the back of the lobe, the occipital area. That is a second finding.

So we have two overall findings. One is the overall decreased in cortical cerebellum ratio that is a one point

area, and more specifically, the ventricle or floor of the brain compared to the back of the brain, occipital ratio.

And if I could show some of these findings, I think it might be helpful to actually show some of these as opposed to just talking about it.

Q. Now, looking at the next slide that has the control in Timothy Hurst. Can you explain to us what we're looking at here?

A. Yes, so what we have here — and so this is a slice of the brain near the floor of the brain, toward the bottom of the brain and if you were to impose an imaginary clock face on each of the scans, let's say, so the 12 o'clock is on the top of the brain, 6 o'clock is at the bottom, you know, 9 o'clock would be the left side of the [604] brain and 3 o'clock would be on the right side of the brain, if you look at the normal control subject and you look at the front of the brain, the area that goes, say, roughly from counter-clock to 2 o'clock, you will see there is a fair amount of yellow in that area over there, which indicates a relatively high level of activity.

Now, if you go towards the bottom, the occipital area of the normal control, you see the area that goes from roughly 4 o'clock to 8 o'clock. You look at that yellow rim, do you see it's kind of like a yellow rim, kind of like a tire on the bottom of the brain, the yellow rim, at the top of the brain is the normal control. So you're seeing the frontal lobe, this yellow rim, between the area of 10 o'clock to 2 o'clock. This yellow rim is kind of like a tire, say, at the bottom from 4 o'clock to 8 o'clock, they are both kind of yellow. They are roughly equal in activity here.

But if you look at Mr. Timothy Hurst's brain and you look at the area that goes roughly from 10 o'clock to

2 o'clock, you'll see there is a fair amount of green mixed in with the yellow and so this area shows less active and you look at the back of the brain that area, that rim at the bottom that goes from roughly 4 o'clock to 6 o'clock to 8 o'clock, you will see there is a fair amount of red actually in that part of the rim.

[605] And so we're seeing that if it goes to the next slide here, we can think of this kind of like a ratio. What we have here, if it was the normal control, you'll see the frontal lobe is in green and the back of the brain is in red. You'll see that the frontal lobe of the brain is roughly equal, between the front and the back. It's like a brain that is kind of imbalanced, so to speak.

If you look at Mr. Hurst's brain and you look at the frontal lobe, you'll see it's much less active than the back of the brain.

And if we go back to the previous slide — so if you're thinking about kind of like a seesaw, the seesaw between the front of the brain and the normal control at yellow rim between 10 o'clock and 2 o'clock and the yellow rim at the bottom, say, 4 o'clock to 8 o'clock, they are both yellow, so that seesaw is an evenly balance, kind of like this; whereas, if you look at Mr. Timothy Hurst's brain, you'll see the front of his brain is lower, more green and less yellow and the back of his brain is more red, so the seesaw tilted in an abnormal direction. So this is what we call a decreased frontal lobe to occipital lobe ratio activity.

If we go to the next slide again, you will see that seesaw created a normal curve, the front and back of the brain is equally. If you look at the seesaw between the **[606]** front and back of the brain of Mr. Hurst, you will see it's quite imbalanced, than the back of the brain being much higher than the front of the brain. The

front of the brain is more green, less yellow. The back of the brain, there's a lot more red. The normal control, the front and back are both roughly equal in terms of the amount of yellow that they had. And this is a pattern that is a hypo-decreased frontal lobe pattern, and it's consistent with some type of history brain abnormality.

The other thing that I should mention here, if we go back to the previous slide where the picture of the brain, if you'll — if you'll look in the brain, think of the brain kind of like those Russian dolls, where the dolls are nested one side to the other. If you think of the brain of being — having at least two different layers, one inside the other layer, and you look at the inner layer of the normal control, you will see there is kind of like a second internal layer that looks like sort of commas. In those commas are what we call colonnade; they are part — you'll see those two yellow comas there in a second, the deeper layer there. If you look at those commas in Mr. Hurst, you will see they are less active in Mr. Hurst.

If you go back to the normal control, you look at the very center of the brain, there is like a little yellow dot, like in the very center of his brain there, and [607] it looks like, maybe an upside down V. If you look at the upside down V, in the very center of Mr. Hurst's brain, you'll see there is more green, less yellow.

These are also indicative of decreased parts of the cortex and subcortex or the cerebellum. What we're seeing in this picture is the cortical decrease in the area of not only the frontal lobe, but the subcortical area, and this — areas as compared to the normal control.

So we're seeing widespread abnormalities in Mr. Hurst's brain in multiple areas.

Q. Now, as far as going to the — to the slide entitled brain injuries increased risk of other neuropsychiatric complications, can you explain to us how these brain injuries increase that risk?

A. Well, we know if you have damage to areas of the brain such as the frontal lobe area, that this is an area of the brain that is very important within like judgment and impulse control. And so people with damage to their frontal area of their brain are not only going to have problems with thinking and cognition, they are going to have the parameter ability with memory but they are also going to have problems with judgment, and the ability to regulate impulses. And so you can have behaviors that can result in problems, like a learning impairment, like ADD type appearances, and so — so brain — increase of risk is [608] having impairment in impulse control and judgment, as well as some problems with learning and memory.

Q. Now, as far as the slide entitled prefrontal damage, can you explain to us what prefrontal damage means?

A. Yes, the prefrontal damage is the part of the frontal lobe of the brain. I was showing how the frontal lobe area of Mr. Hurst's brain is less active as compared to other parts of the brain where it should be in balance. We're seeing the frontal lobe of the brain is imbalanced compared to the other areas where the more control shows a more balanced frontal lobe depending on the other part of the brain.

This kind of imbalance is associated with damage. This type of damage is associated with things such as lack of judgment, risk taking, it being impulsive, immature, you know. And so this is something that has been known for decades now, that if you have impaired

frontal lobe, you're going to have impairment in your ability to exercise proper judgment and proper impulse control.

And you move on to the next slide, please. You know, there are many review articles that have been published that talk about how the frontal lobe helps to regulate aggression. When you have damage to the frontal lobe, you're going to have impairment and ability to regulate aggression.

[609] Move on to the next slide, please. So again, these are just some other review articles that talk about how the frontal lobe is — kind of like the brakes of a car. It's kind of like if you're driving a car and the brakes are faulty, you're more likely to go off the road, when the road curves to brake the car. The frontal lobe acts kind of like the brakes on aggressive impulses. It's kind of, like, you know, takes — kind of apply the brakes, let's think about the consequences, what's going to happen.

And when you're frontal lobe is not working properly, you're not simply thinking about all the consequences, how it's going to play out. It's kind of like driving a car when the brakes are not working and not able to steer the car correctly.

And we know that folks that — move on to the next slide — like for Vietnam head injury study.

This is a study that looked at Vietnam veterans who had damage to the brain areas, and you look at vets that had damage to the frontal lobe area of the brain was displaying the same kind of damage of the brain, like the back of the brain. A veteran that had the same type of injury on the frontal lobe were more violate than a veteran in the same size and non-frontal ar-

eas of the brain. This is an example of the kind of contact that is very important in terms of how the people to be able to regulate impulse [610] control especially in violence and aggression.

And move on to the next slide, please. In veteran studies have shown that PET scan, people usually have problems with impulse control and regulation of aggression have impaired frontal lobe activity.

And if we can move on to the next slide, please. Now, having abnormality in the frontal lobe is a risk factor, kind of like having high cholesterol which is a risk factor to heart disease.

If you have other risk factors — let's say that if you have a patient who has high cholesterol and they are also obese and they don't exercise, they are going to be nor likely to have that heart attack if you have more risk factors than if you have a single factor. The same is true for a person who has an abnormal function of the brain, that's a risk factor.

If you grow up in an environment where there is some type of physical — physical abuse, grow up with some kind of dysfunction, then you're — like having a second risk factor. It's like a patient who has not really high cholesterol, but also cigarette smoking will be more likely to multiple risk factors, just like you're more likely to have a heart attack, if you have multiple risk factors.

If we can move on to the next slide, please. [611] So growing up — on the other hand, if you have an intact brain, then you're more likely to be able to overcome growing up in a dysfunctional environment. But if your brain is impaired, it's kind of like a double whammy because you're not able to learn how to cope

and adapt when the stress of going up in an environment that is stressful or dysfunctional, and so this is true especially if the damage to the brain occurred when you were younger. So there are studies that show that individuals who have early damage to the brain would be at higher risk, especially for acting out in later life than damage to the brain later in life, so I think that that's kind of where — the end of my PowerPoint.

MR. DOSS: Judge, I would tender the witness at this point.

THE COURT: Okay.

CROSS-EXAMINATION

BY MR. MOLCHAN:

Q. Good afternoon, Doctor.

A. Good afternoon.

Q. Can you hear me? I'm John Molchan with the state attorney's office.

A. Yes, I can hear you fine.

Q. Just a couple of questions, Doctor. While the PET scan is a fantastic instrument, what you're saying it [612] really is still just a piece of a puzzle in evaluating the level of brain injury. Would that be a fair statement?

A. Yes, I would say it's one of the pieces of the puzzle. I would agree with that. Yeah, you have to look at multiple other factors.

Q. Now, you — you've done the scan on Mr. Hurst. Would it be fair to say or do you have any idea the percentage of folks that are walking around in our community with like or similar brain functioning as Mr. Hurst?

A. Well, I would say that — there are probably other individuals in the community that have patterns that may be similar, especially if they have, you know, had some history of head trauma or especially if they had some history of, say, like a fetal alcohol syndrome. The kind of pattern that Mr. Hurst had is the kind of pattern that has been reported in fetal alcohol syndrome. So if you have had, you know, those kind of factors in your life, it is quite possible you may have a pattern very similar to Mr. Hurst.

Q. So is — there are folks walking around with Mr. Hurst with similar types of brain functions as Mr. Hurst?

A. Yes, I would agree with that, especially if they have similar histories.

Q. Now, as far as — you're not saying [613] Mr. Hurst's case is one in which there is a traumatic brain injury, are you, sir?

A. Well —

Q. Or do you know?

A. I'm saying it would be consistent or compatible with several factors. It would be consistent with a possible history of head traumA. It would also be consistent with a history of, say, fetal alcohol syndrome, so — just like if you have a fever, it could be due to pneumonia or it could also be due to, say, appendicitis. The fever itself does not tell you whether it's pneumonia or appendicitis, either of those can cause elevated fever.

So a head trauma or fetal alcohol syndrome can cause these kind of patterns. I cannot really tell by the PET scan by itself what's the specific cause other than a doctor saying from a temperature, does the patient have pneumonia or appendicitis.

Q. Now, additionally, would you agree that the brain is really one of the most incredible organs in the body without a doubt?

A. Yes, I would say it's the most incredible structure in the known universe.

Q. In fact, it has like — you used the analogy of the heart and the EKG and the stress test that has been done on that; correct?

[614] A. Yes.

Q. You talk about the fact that the heart — or you're aware, as a doctor, that even when it's stressed and even when it's misused tends to work to compensate for blockages and things like that, wouldn't you say? Is that a fair statement?

A. Yes, I would say there are compensations that the body tries to make.

Q. Would you say that that is also true, sir, with the brain, in the fact that there is an incredible ability of the brain that really we're still struggling with understanding to adapt to trauma that is done to it?

A. I wouldn't say that. There is some restorative and healing capacity in many people's brains, so that's why — you know, for example, 90 percent of people with, quote, mild traumatic brain injury show full recovery after several months, but, you know, that capacity for healing or restoration is not present in everyone. It's not in most people. So the once — I tend to see the ones who don't have that kind of capacity.

Q. Because, in essence, the brain is the — brain types of cells do not regenerate as other portions of the body. Is that a fair statement?

A. I would say the brain doesn't regenerate as well as other parts of the body, that is correct. There is [615] some regeneration that can occur in some individuals, but it's not as good as other organs of the body.

Q. Now, with respect to Mr. Hurst, you indicated that his decreased or — well, let's talk about it, in general. The frontal lobe portion that talks about judgment and impulsive nature, again that is something that PET — what we know historically that the PET scan and that frontal area tends to control, that of impulsivity and that of judgment. Would that be a fair statement?

A. Yes, we know that historically from many different types of case reports and studies.

Q. And basically then, his history and how he handles himself when he's teased, when he's angered, and how he reacts to that is really — shows the depth of the injury and how it impacts that part of the brain?

A. I would say it varies. Some individual brain damage, sometimes the damage may not be — behavioral problems from damage can vary in terms of their presentation. So in some individuals it can be — the presentation can be manifested consistently early. In other individuals it can be more inconsistent and may vary in terms of when it may manifest, and may depend on factors such as stress or substance abuse or other things.

Q. In essence, you're still saying the PET scan is only part of the puzzle in that situation?

[616] A. That's correct. It's only a piece of the puzzle. That's correct.

Q. And going back to the brain and its ability to adapt, its ability to adapt, I mean, is really something

that — haven't we seen situations where sides of the brain actually compensate for injured sides of the other brain?

A. That has occurred in some cases, yes.

Q. I mean, in fact, Representative Gifford, the one that was shot, she showed remarkably regenerative powers of her brain after her traumatic injuries?

A. Yeah, I think Gabby Gifford is a remarkably individual who showed an unlikely degree of recovery. Most individuals, who would have had the same kind of damage, would never be able to speak again, you know. So yes, I think there is a significant brain — some individuals can show almost miraculous recovery and some individuals, unfortunately, are less fortunate and may never show that degree of recovery.

MR. MOLCHAN: No other questions, Your Honor.

MR. DOSS: No redirect, Judge.

THE COURT: All right. Dr. Wu — THE WITNESS: Yes, Your Honor.

THE COURT: — apparently they have no further questions for you, so I'm going to direct my aid here to disconnect.

[617] THE WITNESS: Thank you, Your Honor.

THE COURT: You're released.

THE WITNESS: Okay. Thank you.

THE COURT: Mr. Doss, anything else for today?

MR. DOSS: Nothing else for today, Judge.

THE COURT: Any reason that we need to start earlier than 9 o'clock, or is 9 o'clock okay?

MR. MOLCHAN: I think 9 o'clock should be fine, Your Honor.

MR. DOSS: I agree with Mr. Molchan.

THE COURT: All right. Folks, we didn't know whether this was going to take longer because we didn't know how his responses were going to go, so I'm pleasantly surprised, as I'm sure you folks are.

We're going to adjourned for today. We'll pick it up in the morning. Be back in at 8:45; we'll hopefully get started at 9.

(Jury out)

THE COURT: Just for a little bit of housekeeping, I know you said that you believe — everyone can be seated, if they choose to.

I know you folks said that tomorrow was going to be a fairly full day. Do you still anticipate that?

MR. DOSS: I have Dr. Krop and Dr. Taub.

MR. MOLCHAN: I would have a short — Dr. [618] McClaren, and play a statement from Mr. Hurst.

MR. DOSS: I think we're —

THE COURT: That could be 30 minutes or that could be four hours.

MR. MOLCHAN: The statement is going to be 30 minutes, I think. It's not that long.

MR. DOSS: I didn't think it was that long. It's not even 30 pages on a transcript.

MR. MOLCHAN: Seventeen or 18 pages.

THE COURT: Do you think you will be done by noon?

MR. MOLCHAN: No, I don't think we will be done by noon.

THE COURT: Is it still the plan that we're going to excuse them and bring them back Friday morning to do closings and instructions, and then release them to deliberate?

MR. DOSS: That's the plan that Mr. Molchan and I were operating on. When you said that — we like that plan.

THE COURT: All right. The other thing also is, do you — and I'm not going to hold you to it, but do you have any idea how long you anticipate for closings? Mr. Molchan.

MR. MOLCHAN: Forty-five minutes for me is [619] probably going to be long, Judge.

MR. DOSS: Honestly, I hadn't contemplated that, Judge. I don't know.

THE COURT: Okay. Do you foresee going over two hours?

MR. DOSS: Oh, no, I'm never done that.

THE COURT: Well, I'm looking for the extreme. I'm trying to figure out —

MR. DOSS: Judge, I don't think it would.

MR. MOLCHAN: I get one and he rebuts, so that's not like we're going back and forth.

THE COURT: I understand.

MR. DOSS: Forty-five minutes to an hour, that sounds fine. We'll see how tomorrow works out, but that sounds fine.

THE COURT: All right. One of the reasons I'm asking is I think that my judicial assistant, I think I had her set something. I'm not sure whether she did or not. I'm trying to get them — I think I had her set something for 11, which I think would give me adequate time. You folks take priority, so it's not a problem. It's my problem.

MR. DOSS: We can come back earlier on Friday, Judge, if that was the case. We can start at 8:30. If we're letting everybody loose early on Thursday, then [620] I see no reason we can't start at 8:30.

THE COURT: Which brings me to the last thing, as far as going over the last instructions, because we do need to do that so —

MR. MOLCHAN: Tomorrow afternoon.

THE COURT: — tomorrow afternoon once everyone rests.

MR. DOSS: That sounds good. Once everybody rests, we do that.

MR. MOLCHAN: Yeah.

MR. DOSS: All right.

THE COURT: See y'all at 9 o'clock in the morning.

MR. DOSS: Thank you, Judge.

(Conclusion of proceedings held 3/7/12)

[621] (Proceedings held 3/8/12)

THE COURT: Anything we need to take up before we bring in the jury?

MR. DOSS: Judge, we can do it now or do it later, whatever the Court pleases. I had filed the motion that I had told you regarding the Ring motion regarding the

interrogatory verdict or dismissal. I acknowledge in there that the Florida Case Law is against me. It cites Federal case law, and it's filed for preservation purposes as to the Ring issue, as to, you know, the interrogatory verdict issue as well. But all Florida Supreme Court Case Law is against me on it, and I note that in the motion, Judge.

MR. MOLCHAN: In light of Mr. Doss' candor, Judge, I see no reason to waste time or spend time.

THE COURT: All right. Then it is preserved, but it is going to be denied.

MR. DOSS: Judge, I have Dr. Krop. He's ready to go, he's ready to go.

Mr. Taub will be here shortly.

THE COURT: Okay. You're ready to go or you want to wait for Mr. Taub?

MR. DOSS: I'm ready to go, Judge.

THE COURT: All right. Bring in the jury.

(Pause in proceedings)

[622] MR. MOLCHAN: Judge, we have been working on jury instructions in your absence and I think we've got those ironed out too.

THE COURT: Terrific.

MR. DOSS: We can do that in five minutes or less, Judge. By agreement, we're going to agree to that.

THE COURT: That's fine. Mr. Doss, that's not another witness, is it?

MR. DOSS: That's Dr. Taub.

THE COURT: Who's the other one.

MR. DOSS: Dr. Krop is being called.

THE COURT: Are they both going to be in here?

MR. MOLCHAN: I don't have any problem with that, Judge.

MR. DOSS: Dr. McClaren will be in here too. By agreement, we had agreed to that.

THE COURT: That's fine.

(Jury present)

SECURITY OFFICER: Jury's in the box, Your Honor.

THE COURT: Let the record so reflect. Everyone please be seated.

MR. DOSS: Judge, the Defense would call Dr. Harry Krop to the stand.

[623] THE COURT: Come on up, sir.

(Witness sworn)

THE WITNESS: Good morning, Your Honor.

THE COURT: Go ahead, sir. Go ahead and take a seat.

Mr. Doss, whenever you're ready.

MR. DOSS: Thank you, Judge.

WHEREUPON, HARRY KROP,
having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. DOSS:

Q. Would you please state your name for the record?

A. My name is Harry Krop, K-R-O-P.

Q. And how are you employed?

A. I am a licensed psychologist in the State of Florida. I'm the director of Community Behavioral Services, which is a private practice which I began in 1977. It's a private practice of clinical psychology and forensic psychology. I have about 15 other mental — licensed mental health professionals that work for me in that practice with offices in Gainesville, Florida and Jacksonville, Florida.

Q. Would you detail your educational history for the jury?

[624] A. Sure. I have a bachelor's degree in psychology from Temple University in Philadelphia; that was 1964. I received a Master's degree in psychology from American University; that was in 1965. And then I received a P.h.D in clinical psychology from the University of Miami, and that was in 1970.

I did a required clinical internship as part of the P.h.D. That was done in Middletown, Connecticut, Connecticut Valley Hospital.

And then the following year I did a post-doctoral internship, which is an elective internship with a specialty in neuropsychology. I did that at the VA center in Gainesville. Basically after that I was hired to stay on at the VA. I stayed on at the VA as a staff clinical psychologist until I started my private practice in '77. I stayed on at the VA part-time and also part-time in private practice and then left the VA in 1988.

Q. As part of your — as part of your practice, do you do forensic evaluations?

A. I do.

Q. And would you explain to the jury what a forensic evaluation is?

A. Well, there's two major type of evaluations that a clinical psychologist would likely perform. One is a clinical evaluation, which is typically done for the purpose [625] of coming up with a psychiatric or mental health diagnosis to assist in treatment planning and so forth.

The other is a forensic evaluation, which is done specifically to address certain legal issues or what we refer to as "psycho legal issues." For example, an evaluation would be done in civil cases perhaps to assist the Court in determining custody issues, placement issues, personal injury cases, perhaps head injuries.

And then in criminal matters like this, usually the issues have to do with the person's — a defendant's competency to proceed, what his or her mental state might be at the time of the offense. Or in death penalty cases, often to determine possible factors that could be determined as possible mitigating factors.

Q. And as far as the death penalty cases in particular, how many death penalty cases have you conducted forensic evaluations on?

A. I have done over 2000.

Q. And have you ever testified in a court as an expert on those — as the result of those forensic evaluations?

A. Yes. I've testified in death penalty cases between 150 and 175 times.

Q. And have you testified exclusively for one side or the other?

[626] A. Generally, when I've testified, it's been — the large majority of the time I would testify for the defense. The reason being when I'm hired to conduct a forensic evaluation, particularly in homicide cases, the evaluations are confidential. So my report would typically go to the attorney who requested the evaluation.

Now, if my report is not particularly helpful, then I wouldn't testify. So if I am asked to testify, it would typically be on those smaller percentage of cases where the attorney felt that I could be helpful in providing testimony. So the majority of cases has been for the defense on death penalty cases.

Overall I've testified as much for the State as I have for the defense in non death penalty cases. The last three or four cases — actually three of the last four I have testified for the State though in death penalty cases.

Q. In part of those forensic evaluations, have you been asked to review someone's intellectual abilities and do a mental retardation evaluation?

A. Yes.

Q. How many times would you say you've done that?

A. Well, I don't do a — I guess what would be referred to as a mental retardation evaluation. I would be asked. And as a rule, when I'm doing an evaluation, [627] particularly if it involves homicide, I would assess the person's intellectual functioning. In those cases where I suspect from talking to the individual or there's other documentation to suggest that the person has some cognitive deficits, that is, lower level of intellectual functioning, then I would conduct a more comprehensive evaluation, which would include using a

standardized intelligence test and also do what we call an "adaptive functioning assessment," which is not only looking at the person's I.Q., but looking in general how that person has functioned in society academically, vocationally, socially, and so forth.

So the adaptive assessment and the intellectual functioning testing are crucial in trying to make a determination whether someone is mentally retarded.

Q. And were you asked to do that in this case?

A. I was.

Q. How did you go about doing that?

A. I initially saw Mr. Hurst to do intellectual testing on January 26th of 2012. He was incarcerated at the time, so the evaluation was done in a private interview room, which was provided for me. And I administered the newest revision of the most widely used intelligence test, which is the Wechsler Adult Intelligent Scale, the Fourth Revision. It's referred to as the WAIS-IV, W-A-I-S - 4.

And in addition to that testing, I also did a [628] test called the "test of memory malingering," which is used to measure a person's effort. It's a standardized test with normative data which can give the examiner some additional information as to how much effort the person has put into that particular test and then, in general, take a look at whether the person is putting forth his or her best effort on the I.Q. testing as well. I don't necessarily just say because he was or was not malingering on that one test — by "malingering" I mean basically purposely trying to look worse than you are, either psychiatrically or intellectually, for some type of advantage or we call secondary gain. So I did

that test just as an independent measure of a person's effort.

And then, of course, you can look at the testing itself and the person's behavior to assess whether you think that the person is putting forth best effort.

Q. Now, on this TOMM, what were the results of the TOMM?

A. The results were inconsistent with what we call — with malingering. In other words, it was my impression and opinion that he was putting forth his optimal effort.

Q. Now, explain to us the WAIS-IV that you administered to Mr. Hurst. How is that conducted?

A. Well, the WAIS-IV consists of both what we [629] refer to as verbal and nonverbal type of tests. So the verbal might be tests where you ask a specific question such as from a some more simple item such as what is a thermometer, who was Martin Luther King. That's what we refer to as information.

So verbal tests are tests such as that or asking a person how two items may be alike or similar that measures more abstract types of thinking.

We test the vocabulary, mathematics, arithmetic. Those are considered verbal — sort of a question and then an answer.

Then there's the nonverbal test, which measures a person's perceptual motor ability giving him certain tasks to perform. And the tests — the WAIS-IV, one of the advantages of that test is that it breaks down intellectual functioning in several different factors where the previous testing did not do that. So it gives you an I.Q., which is what is needed to determine a person —

whether he's mentally retarded or not. But it also gives an assessment of his other strengths and weaknesses as well.

And I meant to say when I — I saw Mr. Hurst on January 26, 2012, but then followed up with other testing on January 30th and then February 6th. So he was seen three times either by myself personally or by my assistant.

Q. What information did you review prior to [630] meeting with Mr. Hurst?

A. I had information regarding the offense in question, the homicide. I also reviewed family interviews that were done by an investigator in this case.

I reviewed his school records both in terms of public school, and, well, then subsequently the charter school that he attended. I reviewed corrections records. I reviewed the tests — either the actual tests themselves or testimony of other mental health experts who have evaluated Mr. Hurst.

I also received recently the reports of Dr. Wu, who I believe testified last night.

I spoke to — I indicated that I had reviewed family interviews that were done by an investigator, but we also actually interviewed various family members — tina Hurst, Timothy Bradley, and Bertha Bradley — and that was done for the purpose of completing what's referred to as the "Adaptive Behavior Assessment System" and it's referred to as ABAS. I call it the ABAS. That's a standardized measure of a person's functioning in the community and school, at home, self-care, job, and so forth. And that's also a necessary component to determine whether a person is mentally retarded.

There's actually three criteria that a person has to meet to be classified or diagnosed with mental [631] retardation. One is that the individual's I.Q. has to be a certain score. We refer to it as two standard deviations, below the mean or the average, and generally that's somewhere around 70 — an I.Q. of 70.

Then the person has to be deficient in — significantly deficient in at least a certain number of adaptive functioning areas.

And then there needs to be indications that the person's intellectual deficits occurred prior to the age of 18.

So those are the three criteria that a person must meet to be classified as mentally retarded.

A person can still function. In other words, a person can have an I.Q. that's in the mentally retarded range, so we can say that the person is functioning at the level of mental retardation. He may or may not meet the other criteria, but he would still have the significant cognitive deficits.

Q. When you say "cognitive deficit," what is a cognitive deficit?

A. It's the way a person thinks. Cognition takes into consideration memory, different types of memory, being able to retain information, being able to store information, being able to call it out when it's needed, the way a person solves problems and so forth in different areas of [632] functioning. And that, again, is what the I.Q. test measures.

Q. And you, in fact, administered the WAIS-IV to Mr. Hurst?

A. Yes.

Q. Did it appear to you — through your testing and observation, can you tell us what your assessment was as to Mr. Hurst's effort on that?

A. Mr. Hurst was very cooperative. He knew that I was coming. He has trust in you as his attorney and he had been informed that I was coming. He didn't know specifically the purpose; he knew I was going to be doing testing. And I explained to him that the information would be kept confidential unless you basically determined that you were going to call me as a witness.

I felt that he put forth good effort. He seemed to have pretty good concentration. He seemed to be attentive. He was pleased when he got one that he knew was right. He got frustrated when he thought that he knew something but somehow couldn't recall it, which happened a few times on the testing. So I felt that he really tried hard on the testing.

Q. And what were the results of the I.Q. testing?

A. He came out with a full scale I.Q. of 69, which is in the category of mental retardation. That is the [633] second percentile of the population, which essentially means that for every 100 people that he would be compared with, there would be 98 individuals that would score higher than he would on this particular test.

And there was what's called a "confidence interval," which is a range that the person would be expected to be functioning at. Because there's always — there could be some variability on the test. And given the results of this test, he would be considered to likely, 95 percent of the time, score somewhere between 66 and 74.

Q. Now as far as the adaptive functioning aspect, I think you had mentioned the — as you called it, the ABAS. Can you explain to us actually what that is and what that does?

A. Again, the ABAS is a standardized test, psychologically differentiated to be a reliable instrument in measuring an individual's functioning level over time. The individual can take the instrument or measure him or herself, but it's also very important to have other individuals, either family members, employers, school teachers and so forth, that are familiar with the individual. So in his case, we were able to have the three family members and Mr. Hurst himself complete it.

What it does it has different categories, and I'll just give some examples. Starting off with very simple [634] kind of — for example, in the area of communication, the first item is, can he say the name of other people, for example, friends — or names of friends and so forth. And then the individual is asked to rate that in terms of he can't do that, he can do it all the time, or he can do it certain times. Again, I gave you the simplest communication because this can be very low functioning individuals who are being rated or higher level functioning.

And then the highest item — I'm giving you the lowest and the highest. The highest item in that is can take turns talking during conversations with people. In other words, he's not too talkative or too quite. Talks about realistic future educational and career goals. So those are some examples of communication.

A second area would be community use. Going to a lower thing like finding the restroom in public places to a higher level item such as using the local library to check out books, using reference materials, asking a

store clerk for product information before buying an item.

The other areas are functional academics, home living. Things like being able to operate a microwave oven. Health and safety, such as, again, a simple thing such as swallowing liquid medicines if needed for illness to planning meals in order to get necessary nutrition.

The other areas would be leisure time, self [635] care, self direction, social. And so those would be all the areas the individual, either someone else or in this case Mr. Hurst himself, I asked him these questions.

Certain scores are obtained and certain levels of adaptive functioning are obtained based on these particular normative data.

Q. Is that a recognized system of testing in your field?

A. Yes.

Q. The ABAS?

A. Yes.

Q. And what about the WAIS-IV? Is that generally accepted in — within the scientific community within your field as an accepted method of testing?

A. Absolutely.

Q. Can you share with us the results of the ABAS or the Adaptive Functioning Testing?

A. Well all four, including Mr. Hurst's, in terms of their ratings, came out significantly deficient.

There are certain areas, for example — and this is also true on the WAIS-IV. He was a little higher. His strength actually is in math, and he says that he actual-

ly practices and likes doing those kind of problems. But the overall scores, if I took all four of the scores, including Mr. Hurst and the other three family members, he [636] came out as significantly deficient in all areas. Communication, which is probably one of his higher scores, self care is also a relatively high score. But when I say "high," again I'm saying relative.

So based on the totality of all of the adaptive functioning system ratings, he would meet the criteria that are set out for the definition of mental retardation.

Q. So even though you say it was a relatively high score, give us the framework of what you're saying that's relative to.

A. Relative to his other — in other words, if I compared it to other individuals in the population, it would be low. Comparing his areas, for example, math or arithmetic, compared to his other scores, that's one of his higher scores. But it still reflects deficits.

Q. So regardless of the way it reflects with his other scores, it's still in that very low percentile.

A. Yes.

Q. When you compare it to the population at large?

A. Yes. In the — actually in the computer printout of the WAIS, for example — as the result, there's a computer printout after you get all the scores and you can enter these in and there's — the producer of the test has [637] developed software to enter the scores and then give you a printout as to basically interpretation of the test scores. And in terms of his general intellectual ability, it said his overall thinking and reasoning abilities exceed those of only approximately only two percent of the individuals his age.

Timothy may experience great difficulty in keeping up with his peers in a wide variety of situations that require thinking and reasoning ability, and then it goes into each of the specific areas, such as verbal comprehension, for example. That also says he scored in the extremely low range. However — or it is likely that he would experience great difficulty in keeping up with his peers in situations that require verbal skills. Of course, I can go on and on. That's based on the interpretation of the WAIS-IV, but it's consistent with what other individuals say about him with regard to the adaptive functioning.

Q. And is that — now did you review school records as part of your evaluation?

A. I did.

Q. Was that consistent with the school records that you reviewed?

A. In school he had a grade point average in the upper grades of 1.2, which is basically a "D" average in school. He repeated 10th grade. And it looks like even [638] after he went through the charter school, he was not functioning at a level that allowed him to complete — get any kind of degree or certificate.

One of the individuals that I forgot to mention that I believed did testify here, I spoke to Calvin Harris, who is a retired vice principal, who I think knew Mr. Hurst. What he indicated to me which best fits is he fell between the cracks.

So clearly he should have been — based on his test scores, grades, he should have in my opinion been in special education to assist him. In fact, since he's been incarcerated, he's probably made some gains in terms of trying to improve himself academically or education-

ally. He feels good about — he's asking others to help him in terms of reading and things like that.

And as I said, when he was administered the test, when I asked him certain tests — certain items that he knew, he was really proud of himself for being able to get those right.

Q. Did you conduct any neuropsychological testing?

A. Yes. After I did the initial testing — my initial role was to do the intellectual testing. But after I spoke to him and got some history from him, I felt that there may be some, what we refer to as, neuropsychological [639] impairment. And there are certain batteries, certain types of tests that clinical psychologists who have that type of training that I do in terms of neuropsychological assessment would do in cases like Mr. Hurst.

So he was administered a battery of neuropsychological tests on the two following occasions that he was seen.

Q. And as the result of the — as the result of the — what did the neuropsychological testing tell you?

A. He was low average on most of the neuropsychological testing. But there was also some of the testing which suggested either borderline or mild impairment.

I noticed in reviewing one of the previous psychologist's evaluation, and it was not a full neuropsychological testing, but there were certain neuropsychological tests, particularly one that measures executive functions or what we call frontal lobe functions that showed mild impairment. That was one of the other things that triggered what I thought was important, to

take a look at a more comprehensive neuropsychological battery.

The results of my testing, I would say, were borderline, and I recommended, based on that, that he have a more thorough neurological evaluation, some imaging. And I became aware then that Dr. Wu had subsequently done the PET [640] scan and, again, testified. Dr. Wu sent me his results, which supported the likelihood that there is some organic, particularly frontal temporal lobe damage.

Q. What does that frontal lobe and temporal lobe — can you tell us what that does, what that controls?

A. Well the frontal lobe specifically is the area of the brain that controls or is associated with what we call "executive functions." Those are the higher level functions of a person's thinking. They are the — the frontal lobe is the last area of the brain to mature and develop, which is why — and it's responsible for problem solving, judgment, impulse control, inhibition. That's why we see, for example, young teen-agers or — and males actually mature later than females. So we even see 18, 19-year-old individuals whose frontal lobe is not yet fully developed. They take more risks, they don't think ahead, and their inhibitions are lower and so forth. So that is what the frontal lobe does.

Q. Now as part of your — whenever you looked at the totality of the data and the testing, were you able to come to some kind of opinion as to whether or not Timothy Hurst was mentally retarded?

A. It's my opinion that Mr. Hurst is mentally retarded.

Q. Now as part of the your review, did you [641] receive and review an MMPI2 performed by Dr. McClaren?

A. I did, recently.

Q. Did you rely upon that?

A. No.

Q. And why did you not rely upon that?

A. The MMPI2, which is an excellent test to assess a person's personality functioning. It measures different areas of a person's personality, and — but the MMPI2 requires an 8th grade reading level, according to the manual of the MMPI. And based on my own assessment of Mr. Hurst as well as the assessment that had been done previously — for example, one of the psychologists that previously evaluated him found him to have a reading level at the 3rd grade. And recently — and I think this is a function of Mr. Hurst's attempts to really improve himself — Dr. Taub found him to be — to have a reading level at 6.7. So both of those, even though he's improved in reading, he is not at the level that you can get a valid MMPI.

The other reason is, in looking at Dr. McClaren's MMPI2, Mr. Hurst did not answer 50 of the items on the test, which would invalidate the test anyway even if he had a higher reading level. Because of the number of items you would not be able to really interpret the test.

Q. As far as — now did you review a WAIS-IV that [642] was conducted by Dr. McClaren as well?

A. I did.

Q. Did you rely upon that in coming to your opinion?

A. Well, I reviewed it. I did not rely upon it in terms of my opinion as far as his functioning in the mentally retarded range.

Q. Why is it you did not rely upon it?

A. Well, Dr. McClaren, probably through no fault of his own, administered the WAIS-IV on either February 21st or February 22nd. I know he indicated that he saw Mr. Hurst on two occasions. I believe he gave the WAIS-IV — I think he gave the MMPI on the first day and then the WAIS-IV on the next day. That's about three weeks after I did the evaluation.

Again, I'm not sure — I've spoken to Dr. McClaren, and he indicated that he was not aware I had given him the WAIS-IV, which is why I say through no fault of his own. But when you take the same test at such a short interval, it's — it's very difficult to get a reliable test score because of what we refer to as the "practice effect."

When an individual is given a particular test, in this case the WAIS-IV. and then is given another test in such a short — after such a short interval, he still has the ability to either remember some of the items that were [643] on the first test or because he's, again, learned certain what we call "process" — in other words, he's learned how to do certain items now or take the test where as prior to that he had never been exposed to that particular test.

So the test manual clearly indicates that when an individual takes a test that close in time, he's going to have likely a significantly higher score because of the practice effect.

Q. And is that mentioned in the WAIS manuals?

A. Yes. It's in the WAIS-IV technical manual, and it's something that has been studied and it's almost always shown, not only in the WAIS-IV but other tests of that nature, that there will be a practice effect.

Of course the longer one waits to give the second test, or the same test but a second time, there's less likely that practice effect sort of dissipates. But in that period of time, that's considered very short.

There is a way to sort of ameliorate. If you have to, or for whatever reason you give the WAIS-IV a second time within that short period of interval, you can try and get a more reliable test by giving what's called the "supplemental test." So the WAIS-IV has other tests that are not — other subtests that are not necessarily used to obtain the original I.Q.

So it says in the manual that if you do retest [644] them, you can give those supplemental tests instead of the ones that you gave. Because they measure pretty much the same thing, but they don't have the same content as the ones you did before.

Q. So you've got a standard battery of tests that you typically give?

A. Yes.

Q. And then you've got these supplemental tests that if for some reason that you have to re-test within that year period, you should use those?

A. Yes.

Q. Dr. McClaren didn't use those not knowing that he had been tested?

A. That's correct.

Q. Correct?

A. That's correct.

Q. So then that's why you didn't rely on them?

A. Correct.

Q. You had mentioned in the WAIS manual that it had discussed the practice effect.

A. Yes.

Q. And is that generally accepted within the psychological community as a noted phenomenon?

A. The concept of the practice effect?

Q. Yes, sir.

[645] A. Yes, it is.

Q. And is it mentioned within the standards of — for psychological testing?

A. Yes.

Q. And the fair testing code?

A. Yes.

Q. And in both of those, are those authoritative in your field?

A. Yes. The code, as it's referred to, is basically different things, different practices that both the tests — the persons who produce the tests as well as the individuals who use the tests, there are guidelines to go by so that the testing that's done is done in a fair way that takes into consideration different cultural demographics as well as conditions. And it's used — the philosophy is for the purpose of providing an ethical measure of a person's functioning, not only intellectual, but it certainly will also apply to other types of test generated data.

MR. DOSS: No other questions, Judge.

CROSS-EXAMINATION

BY MR. MOLCHAN:

Q. Hey, Dr. Krop.

A. Good morning, Mr. Molchan.

Q. I just have a few questions for you. [646] Your primary opinion or evaluation is that Mr. Hurst is, in fact, in your opinion, mentally retarded?

A. That's correct.

Q. Would that be a fair statement?

A. Yes.

Q. You're not making any other diagnosis of any other mental diseases or disorders, such as in a DSM that we're talking about, are you? Or that wasn't your rule?

A. No. Based on my own interview with him as well as the review of documents, I did not see any other diagnosable psychiatric disorder.

Q. So, in fact, you're not saying that Mr. Hurst does not understand the difference between right or wrong in this regard?

A. No.

Q. Now, you made a mention about his executive function in your neuropsychological examination.

A. Yes.

Q. And you described it — let me find my notes — as being — specifically with executive functioning, being low average; is that correct?

A. Overall I believe that would be the results of mine. I had some previous neuro psych executive function tests, The Trail Making by Dr. Riebsame; that was mildly impaired. But overall, I would say it was low average, yes.

[647] Q. Now, if you could talk about low average — and maybe you can just explain it with the average, low average, and where he fits into the scale on that executive functioning from those tests.

A. He does not fit — for the specific tests that we're talking about that I administered, he would not fit into the classification of impaired. In other words, it's above that level. It doesn't reach — basically like on an I.Q. test, the average scores range from 90 to 110, and then below that we start having low average.

So I would not say — if I had done this testing and had no other data to look at, such as the PET scan, I would not make a conclusion to a reasonable degree of psychological certainty that there was impairment. But there was enough there for me to suggest that further testing be done.

Q. Maybe I didn't ask my — you didn't follow my question. It may be inartful; I have no doubt about that. But there are — there's an average?

A. Correct.

Q. It would be the middle ground?

A. Yes.

Q. Is there an above average?

A. Yes.

Q. And then is there anything above above [648] average?

A. Not for these classifications.

Q. Okay. And then there is a below average?

A. Correct.

Q. And is there something below that?

A. Yes, there is.

Q. What is that?

A. There's mild impairment and then a more severe impairment.

Q. So there's a mild impairment that he doesn't — he didn't fit to under those tests. And I don't want to be unclear about that. Under that test, the neuropsychological, he wasn't under mild impairment?

A. Correct.

Q. And he wasn't in — what's the last level?

A. Severe.

Q. Severe?

A. That's correct.

Q. And overall, the I.Q. testing that you did placed him basically in — he basically would be two out of every hundred people in what —

A. Ninety-eight people would have a higher I.Q. than he would.

Q. And two —

A. In every hundred.

[649] Q. In every hundred. That's what we're talking about.

So we still have significant amounts of people out with his same intellectual level in society?

A. Two percent.

Q. Two percent?

A. Yes.

Q. Now in your evaluation, sir — let me go back a little bit. You also looked at some other testing that was done on Mr. Hurst prior to this date by other doctors, did you not?

A. I did.

Q. And what were the I.Q. scores of those — as you recall — and, you know, I know those were above 70 just to —

A. They were around 77 or 78, I believe, full scale.

Q. And those were done how many years ago, approximately?

A. I thought they were done around 2003, if I'm not mistaken.

Q. So there were I.Q. scores done on him above the 70 level?

A. Yes. It was a different test.

Q. Different test?

[650] A. It was the earlier revision of the WAIS.

Q. Now in this case, you indicated that you also reviewed records about the offense and the homicide and materials.

Were you at any time — or did you listen to a tape recorded statement by Mr. Hurst to law enforcement?

A. I did not listen to it, no.

Q. You did you not listen to it. Did you receive a transcript of it?

A. I don't know if I had a transcript. I had a reference to it.

Q. A reference to it?

A. Yes.

Q. Now, would you agree though that engaging in deceitful behavior is, in fact, a cognitive function, is it not?

A. It's — it's what we refer to as "intentional behavior," yes. It's certainly partly cognitive.

Q. And were you aware in this particular case that there's evidence that Mr. Hurst told another young man to wash the pants — wash his pants, which had blood on it?

A. I reviewed that, yes.

Q. And would that not be a degree of a cognitive thought process going on?

A. Sure.

[651] Q. The fact or the evidence, were you aware that he takes the money and places it at another person's house away from him?

A. I'm aware of that.

Q. You're aware of that?

A. Yes.

Q. Is that not a cognitive thinking process?

A. Sure.

Q. And the fact — or the evidence that's available that indicates that Mr. Hurst had evidence, the victim's driver's license or purse, and takes that and has it

placed in a garbage can, would that also be indications of a cognitive functioning individual?

A. Sure.

Q. And also at the crime scene, there's evidence of significant blood shed. But there's also evidence that at someplace there was a wet floor, which could lead one to — somebody mopped up the floor after the crime occurred. Would that not be, again, an indication of some degree of cognitive intellectual thought?

A. Sure. I mean, everybody has degrees of cognitive functioning. And a person, say hypothetically, attempting to avoid being caught or being accused of something is certainly capable of those kinds of decisions.

I mean, starting as a young kid, the kid who [652] took a cookie from the cookie jar will say he didn't do it. It's a low level of functioning, but it's certainly a type of cognitive functioning.

Q. Did you — you took that into account in reaching your — you took all of those factors into account in your finding?

A. I did, yes.

MR. MOLCHAN: No other questions.

MR. DOSS: Just a couple.

REDIRECT EXAMINATION

BY MR. DOSS:

Q. Dr. Krop, as far as the WAIS-III scores, is that the same test as the WAIS-IV?

A. No.

Q. Is there any correlation between the scores of the WAIS-III and the WAIS-IV?

A. There's a correlation. Some of the items are the same. But, for example, on the — in a similarities, which is part of the verbal comprehension, 12 of the 18 items are different. In the information, Section 11 of the items are new. Some of the scoring criteria has changed. Basically it's updated norm.

So although — I mean, it certainly at the time was the most accepted measure of intelligence. Basically there were flaws in it, and that's why some of the [653] revisions were made.

Q. Is the WAIS-IV the most accurate test that we have available now?

A. Yes.

Q. Does mental retardation mean that you're totally incapable of functioning?

A. Well, there are different degrees of retardation. A person with what's called "mild mental retardation," which is what the testing shows for Mr. Hurst, is capable of various levels of functioning, just not particularly a high level. I mean, persons with mild mental retardation certainly could be capable of working fairly simplistic kinds of problem solving and so forth.

So — and the kinds of things that the prosecutor mentioned, certainly a person with mild mental retardation is capable of doing.

Q. And when you look and you're making a deference as to whether someone's mentally retarded or not, do you focus in and just focus on one piece of data?

A. No, which is why the adaptive assessment is so wildly used because it takes into consideration all different levels of functions.

I mention that arithmetic, relatively-speaking, for Mr. Hurst was his strength. But, again, if you compare him or even that score to all the **[654]** other individuals who have been normed on that particular test, it's still pretty low.

MR. DOSS: No other questions, Judge.

THE COURT: May he be excused?

MR. DOSS: Yes, Judge.

THE COURT: Thank you, sir. You're free to go.

MR. DOSS: Can we approach?

THE COURT: Sure. Do you need the court reporter?

MR. DOSS: No, Judge.

(Bench conference held off the record)

THE COURT: Members of the jury, I have been advised by Counsel that they need a few moments to set up some things. So rather than taking a break 30 minutes from now, I think we'll just go ahead and do it now.

So if you folks would leave your pads and step out, we'll take about a 15-minute break.

(Recess)

THE COURT: Bring in the jury.

(Pause in proceedings)

SECURITY OFFICER: Jury's in the box, Your Honor.

THE COURT: Let the record so reflect. [655] Everyone please be seated.

Mr. Doss, call your next witness.

MR. DOSS: Dr. Gordon Taub.

(Pause in proceedings)

THE COURT: If you'll face the clerk and raise your right hand.

(Witness sworn)

THE COURT: There you go.

WHEREUPON, GORDON TAUB,
having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. DOSS:

Q. Would you state your name for the record, please?

A. Dr. Gordon Edward Taub.

Q. And Dr. Taub, could you tell us how you're employed?

A. I'm an associate professor in school psychology at the University of Central Florida.

Q. Can you relate to us your educational history?

A. Sure. I have a bachelor's in psychology from Florida International University; an EDS degree in school psychology from Florida International University; and a P.h.D in school psychology from the University of Florida.

[656] Q. And as far as your work history as it relates to your chosen field now, could you tell us your history in that?

A. Sure. I did an internship in school psychology. I worked as a school psychologist. I have been a professor in school psychology at the University of Central Florida since 1999 — August of '99.

Q. You might want to speak into the mic. I think it's coming in a little low.

A. Since August of 99.

Q. And what is your focus now as an assistant professor at University of Central Florida?

A. Associate professor. I have a specialization in the measurement of intelligence, the structure of intelligence, intelligence theory, psycho educational assessment, and the evaluation of intelligence tests and achievement tests and other tests used in psychology.

Q. Have you written articles and had them published in any peer review journals or publications?

A. Yes. I've written articles on the Wechsler Scale of Intelligence, on the Woodcock Johnson Test of Intelligence, achievement tests. I'm a national trainer on the Stanford Binet 5 Test of Intelligence, the Woodcock Johnson Test of Cognitive Abilities, the Battelle Developmental Inventory, the Woodcock Johnson Test of [657] Achievement. I've also done national trainings on the Wechsler Scales as well. U.S. publications and several publications in the areas of intelligence focusing on different instruments.

Q. Have you participated in the development of any intelligence testing?

A. Yes. I was a coordinator for the Psychological Corporation, which is the publisher of the Wechsler Scales. We coordinated the pilot and tryout studies at the University of Central Florida through my graduate students to assist them in the development of the standardization of the test. Standardization basically means that with an intelligence test — we have a test in school that's often times developed by a teacher or somebody in the district, a curriculum development person. With the intelligence tests and we call "standardized tests," these are tests that are developed so that each person that administers the test administers it to an individual the exact same way. It asks the exact same questions, asks the same questions the exact way, and is scored consistently for each person that test is administered to.

So when a test goes through standardization, I want to find which items are bad, which items are good. We have different phases, a tryout phase and a pilot phase, and these are the areas that are coordinated by me at the [658] University of Central Florida. And they're also — the test was developed or standardized throughout the country so it wasn't just, you know, my input. My input we had was small compared to the rest of the participants.

There were about 2200 individuals who completed the test as part of standardization, meaning that they were able to obtain scores that they could use to evaluate an examining score — or to compare a examining score once the test was published.

So when we administer a test as psychologists, we obtain a score on an individual. That individual's score is being compared to the 2200 individuals that the test was developed with.

Q. And the 2200, the relevance of that, is that your statistical sample?

A. Yes. Actually on the WAIS-IV, it's 2300.

Q. Now in your employment history, have you had occasion to do intellectual assessments regarding mental retardation of various individuals?

A. Sure. I've done hundreds of evaluations, maybe thousands, I don't know, on administering I.Q. tests for individuals who were either mentally retarded, learning disabled, or had other learning or emotional difficulties.

Q. And in your practice and employment, have you reviewed I.Q. tests that had been conducted by other [659] professionals and assess those as well?

A. Yes, I have.

Q. And have you done assessments in regards to whether someone is, in fact, mentally retarded or not?

A. Yes, I have.

Q. Now let's talk a little bit about intelligence testing. Can you explain to us what the WAIS series is?

A. Yes. The WAIS series is a — was started in 1939. There was a fellow by the name of David Wechsler — and what they were trying to do back then is there were people that were committed in mental asylums. They were trying to find out who was mentally retarded and who was not mentally retarded, and he developed a test called the Bellview Wechsler. He was working at Bellview Hospital, which is where Bellview came from. And in the development of this test, he came up with two scales of intelligence, one called a "verbal scale" and one called a "performance scale."

And he developed tests to measure one's intellectual functioning according to a verbal area, an intellectual functioning according to performance area, which Dr. Krop, who testified before me, referred to a verbal, nonverbal, and it was kind of like that back in 1939.

Q. How many versions have there been? And if you can recall the dates on the different times it was revised.

[660] A. Sure. The first one was the Wechsler Bellview of 1939. Then that was revised in 1955, and instead of called it the "Wechsler Bellview," it was called the "Wechsler Adult Intelligence Scale."

Q. Is that where we get WAIS?

A. That's WAIS, yes. Wechsler Adult Intelligence Scale.

And then in 1981 the WAIS was revised, and that was called the WAIS-R. Like an Ipod 2, WAIS-2.

And then in 1997 the WAIS-R, which was a second version, was revised into the WAIS-III.

And then in 2008, the WAIS-III was revised into the WAIS-IV.

Q. When was it among those that the first — maybe I'm not saying it correctly. But when did the first technological advancement occur in the measurement of intelligence through these full scale I.Q. numbers that you would get from the WAIS?

A. I have some slides that I did that could maybe show that, if you want me to do it. Because it's kind of complex.

Q. Okay.

A. We talked —

Q. Didn't mean to blind you.

A. I was told it wasn't going to hit me.

[661] I teach graduate courses in assessment and intelligence. And although it seems really simple, it's really kind of complex. So I came up with this little diagram to make it a little bit easier to understand what we're talking about when we look at intelligence.

What I did — I have this little pointer — is — the term that Dr. Krop used was a full scale I.Q. of I think one was a 77 or 78 and the other one was a 69, and that's like a full scale score. And so the idea is we're trying to measure intelligence of full scale score. And so instead of measuring intelligence, I made this little slide and we're measuring liquids just to make it a little bit easier because we all know what liquids are. So we're trying to get an overall understanding of liquids and a score for liquids. Maybe it could be something if they like liquids or what liquids are, however you want to look at what liquids is in this example.

But basically when we think of liquids, we could break it down into different areas. So we have sodas, water, milk, syrup, and juice. And when Dr. Krop was talking, he had mentioned verbal performance. So, you know, water could be verbal — or soda could be verbal and performance could be water. So we're just looking at two areas of intelligence.

The idea that we do with intelligence tests is [662] we're trying to measure what we call "factors" or broad areas of intelligence, such as verbal performance. And in order to measure that, we have to administer tests. And so the tests are down here. So let's say that we wanted to get a measure of verbal ability. We'd give two tests of verbal ability. In this example, we're try-

ing to get a measure of juice. We have two different kinds of juice, apple juice and orange juice. Then we'd find out, okay, does this person like juice. Do they have a plus yes, I like it and plus yes, I like it over here. So we have, you know, a high score here on juice. If they don't like it, it would be a low score.

Then we would go on to a different area of intelligence, like the verbal are. What did I say, it was performance or verbal? I forget.

Well, so let's say it was verbal. We'll go over here and make it performance and we'll have two separate tests, each one measuring a different area of performance, and they'll get a broad measure of that factor of intelligence.

So the idea is that we administer individual intelligence tests, and the tests that we administer together are measuring a factor of intelligence, a broad factor. Then we take these broad factors and we combine them together, and we get what's called a "full scale score [663] of intelligence."

So in this example, we'd have several different areas of liquid that we're measuring, and we put it together and we would have an overall measure of liquids.

So when we're looking at — go to the next slide. We look at the WAIS-R. This is the verbal/nonverbal that Mr. Krop was talking about. That we have our full scale score, and we have verbal factor of intelligence, a performance factor of intelligence, and then there's tests measuring each one of these.

So an individual would be administered six tests, and those would combine into a verbal score. And then they would complete five more tests, and those would combine into a performance intelligence score. Then

the two of these scores combine into a full scale I.Q. score.

That's a real simple understanding of how intelligence is measured. Just administering tests, getting overall factor scores, and then combining our factor scores into full scale score.

So this was the WAIS-R, which is the second one like that Ipod 2, which was virtually very few changes between that and the original WAIS. They bought have the verbal performance scale. And —

Q. So when was it that the first major change as far as this WAIS series came?

[664] A. Well, the next change after 1981 — I think we go to the next slide — was the Wechsler Adult Intelligence Scale III. That was in 1997.

If you go to the next slide, we see that what happened in 1997, they took out one of the tests. I think if you go to the next slide, you'll see this one was called "picture completion on the WAIS-R," the second one.

If you go to the next slide, you'll see that on the WAIS-III, they got rid of the picture completion test and replaced it with this one. So they got rid of one test and added a test.

In addition, they had a new group of people that completed the test. That sample of around 2200 people a across the country were identified as far as sex, level of education, where they completed high school, if they completed high school or not, level of college. And there are people in the sample that the scores are derived from who did not complete college, who did not complete high school, who completed some college, who completed four years of college, and who completed graduate school, and it basically mirrors the census

from 1990. So whatever percentage of the population had high school diplomas, that percentage was represented in the sample that the scores were deprived on before this test. The same thing happened in the earlier version as well back in 1981.

[665] So other than getting a different sample of people, the major change in 1997 is that they added a new test through the Matrix Reasoning Test.

Q. And those are called "normative samples"?

A. The people who participated in the standardization of the instrument where scores are derived from is called the "normative sample."

Q. Why is it significant when these normative samples change?

A. Well, what happens is there's several reasons. I have a slide that kind of talks about why I.Q. scores change over every time.

One of the reasons is that there's an observation that researchers have found that when you administer an I.Q. test that was, let's say, established in 1981 like that WAIS-II — or the — WAIS-R. Yeah, I want to call two the Ipad 2.

The WAIS-R, when it was administered when it was developed in 1981, the people who actually took it to have their scores derived for the scoring of the test was back in 1979. That test was being used all the way up until 1996.

So what happens is, when you compare someone's score from 19 — on a test that was made and really developed in 1979, published in 1981, to a person who is now [666] taking a test in 1996, we have a long time

span. We have, you know, anywhere between 15 and 17 years.

And because of advancements in society — it's not agreed upon by researchers why this happens, but it is agreed that it does happen — that the population gets about one-third of an I.Q. point smarter every year. So when we look at a test that was published in 1981 and compare it to someone who is taking it now in 1996, there's a fifteen-year difference. So there's actually an inflation in their I.Q. score of about five points, about one-third of a point per year.

And realistically, what's happening is, the person taking the I.Q. test, let's say, is 30 years old in 1996. They're actually being compared to someone who was 30 years old in 1979 because the scores are old that the test was developed from. It's an interesting concept to kind of keep in mind when we look at I.Q. tests. And the publishers, when they develop new tests, talk about this and say this is one reason why we revised our tests. Because a lot of people think, oh, they just revised it because they want to sell more tests for a thousand dollars each and make more money. But actually it's to get a more accurate measure of I.Q.

Q. Why does it vary from the WAIS-III to the WAIS-IV?

[667] A. Well actually, you know what, if we go to the next slide — it was a pretty good slide to come up next. This is another reason why tests are revised. Another reason why tests are revised other than the norms are old, is that the tests may be measuring the same thing. For example, this liquid example that we gave, we have here, you know, soda. We have Coke, Sprite, and Pepsi; they are all different.

Here we have two different types of milk, skim milk and whole milk.

For syrup, we have chocolate and strawberry.

But for water, we have Evian and Aquafina, and there's a big overlap between those. We don't have like soda water and Aquafina. So they're measuring kind of the same thing.

One reason why tests are revised is because the actual subtests that are used in the instrument are found later to be measuring kind of a duplicate area, so they're not providing as much information.

If you go to the next slide — maybe the next one. Yeah, the second one — we see that that's one reason why this Matrix Reasoning Test was added on the WAIS-III. Instead of that picture of completion that we saw before is we had five tests, and it was determined that the picture completion was measuring something that was kind of [668] duplicating one of these other four tests, so they added this new test. So that's why a new test would be added.

If you go to the next slide, another reason why tests are revised is because there may be too many tests measuring one factor. So here we have three measures of soda, and the idea is as many tests as you can give to measure one area is very good. It's giving us as psychologists more information. But from a practical standpoint, the publishers are trying to make these tests fairly easy and quick to administer. So they are only wanting to include about ten or eleven tests down here at the bottom.

So if you have a lot of tests measuring one area, you're using a lot of time to measure one area at the expense of another area of intelligence.

And the other thing that happens is, it could be that there's advances in the understanding of intelligence from a researcher theory basis. So maybe the test publisher would say, okay, what we want to do is not put as many tests to measure soda. Let's try to measure instead of two areas, a third area to get more information about intelligence.

So if we go to the next slide, we see that there were six tests on the WAIS-III that were being used to measure that verbal area. And all together on the whole **[669]** WAIS series from 1939 until 1997, all the tests were based upon that same idea that David Wechsler had back in 1939 and they really didn't change at all. They all used that verbal performance and had several tests to measure verbal and several tests to measure performance. So that was another area that led to the idea for the Wechsler Scales to be revised on the fourth version.

So if we go to the next slide, it's kind of a summary. The WAIS-III was revised to avoid the Evian/Aquafina, that overlapping of measuring one area, eliminating over measuring; so not having six tests measure that verbal area.

Improving tests to measure more specific areas of cognitive ability. For example, we had like five or six areas of liquid. But on the intelligence scale from 1939, they were only measuring two areas. So they wanted to get more areas to expand it.

The other thing is that most people are going to score in what key call an "average range," and so about 68 percent score in the average range. And what happens is, when you get into the people that score in the gifted range, that are really, really smart, the gifted area, and people who are at the lower end, which we

call "mentally handicapped" — the legal term, which is not politically correct, is retardation. It's really mentally handicapped [670] is the term that we use or intellectually deficient. But that's the legal term, so I'll stick with it.

What happens is, a test will have maybe 25 items. The person who is scoring in the gifted range will get most of those 25 items right. The person who is scoring in that mentally handicapped or mentally retarded range will only get a few items right at the top, maybe the first few items.

So one of the weaknesses of the WAIS-III was that there were there not enough items at the easy part to identify people who are lower functioning. And there weren't enough items at the higher end to identify people who were gifted or really gifted, who are just high functioning. So what they did is they added a lot more easier items to identify people who are mentally handicapped, or in this case mentally retarded, and added a lot more harder items to identify people who are high functioning versus gifted.

And then the other reason was that this Matrix Reasoning Test that they put in the WAIS-III is measuring an area of intelligence called "fluid reasoning." They wanted to measure it better, so they added another test to measure fluid reasoning, which, again, is like another one of those liquids, but it was just kind of — they threw it in there with that performance scale. So they are wanting to develop [671] something to measure that better.

And also working memory, which is holding information in our mind, and processing speed, which is kind of how fast do the gears of the mind work. So they wanted to improve measurement in those areas. So

that's why the WAIS-III was revised into the WAIS-IV.

Q. So what did they do as far as the WAIS-IV?

A. So the last one was to update those norms, you know, I had talked about later. I think it was the last one here, but we already talked about it. The older norms resulted in inflated I.Q. scores.

So on the next slide, we see the revision from the WAIS-III to the Wechsler Adult Intelligence Scale, the WAIS-IV.

Q. So what did they do to make it better?

A. On the next — well, it gets it little bit more complicated. The next slide is of the WAIS-III, just to kind of remember what that is like where you have the full scale I.Q. on the top and then we have our verbal ability and our performance ability measured by these tests.

The next slide is the WAIS-IV; it's more complex.

So if we go to the next, we see that it's more similar to that liquid slide that we had at the beginning where we have our full scale I.Q. score, but now we have [672] four areas of intelligence being measured. An analogy for it is if you were to — somebody said they were going to give you a car. So the verbal like we had on the WAIS — if we go back up to the WAIS-III, if you go back to the previous slide.

Q. The previous?

A. Yeah. This would be like them saying, okay, what you have is you have a — it's a Ford, okay. The car I'm talking to you about is a Ford and it has four doors, so you can get your idea of what the car is using that.

Then when you go to the WAIS-IV on the next slide, you find out, okay, it's a Ford, it has four doors, and it's a truck, and it gets 18 miles a gallon. So now you have a much better understanding of that car.

And that's basically what happened with the WAIS-IV is there were technological advancements theoretically as to what is intelligence. And so there's actually a theory of intelligence that was put together — it's kind of complex. But basically a gentlemen by the name of Dr. John Carroll put a bunch of studies together and came up with a theory of intelligence called the "Three Stratum Theory," and that actually became the blueprint for the development of the WAIS-IV in addition to other theories of intelligence.

So what happened is, back in 1939, there [673] really wasn't a theory for the measurement of intelligence. Overtime, theories were developed, but the Wechsler Scales never changed that. They kept that verbal performance dichotomy, that verbal performance intact out of tradition.

Then in 2008, they embraced theories of intelligence and revised the Wechsler Scales to be consistent with that, which was a real departure.

In talking with the folks that, you know, oversaw the development, they were concerned about practitioners adopting it because most people are just so comfortable talking about verbal performance or verbal/nonverbal. Then to bring in these others makes it a little bit more complex and requires more advanced thinking about intelligence when we administer and interpret the test.

So when we look at the next slide, it talks about why I.Q. scores are going to vary between the WAIS-

III and the WAIS-IV, which kind of infer from what we've talked about going from two factors to four factors, from having a bunch of tests measure in one area to having several tests measure in different areas.

If we go to the next slide. I just threw that up there because we already know what the WAIS-III looks like.

Go to the next slide. Here's the WAIS-IV. [674] What happens is, there is one test that was changed. This green is a new test that was changed, visual puzzles, and then all of these other tests were kept from the WAIS-III to the WAIS-IV; so the names are changed — I mean, the names are the same, but what's going on with the tests is different.

Dr. Krop mentioned that on the similarities test, there were, I think out of 18 items, 12 items are new. So completely revised the test, what it's measuring. So what they did is they either changed the content, meaning the items and the administration, or they changed the items or the scoring, and those are the blue ones. That's the smallest amount of change.

And in the revision, I made those red because that was where close to half of the items were changed and there were significant change in the scoring at administration.

So we have one new test. We have a lot of changes in the content of all of the individual subtests that are used to measure intelligence. So because we now have four factors of intelligence being measured, because we now have completely revised tests — it's almost like if we think of a kitchen, on the WAIS-III, we had a new test. So maybe instead of having a single sink, you have a double sink.

[675] On the WAIS-IV, we left the frame of your cabinets there, but you have all new insides, all new doors and new appliances. And then these four factors would represent like a granite countertop going across the top or, you know, it's bringing it all together and is totally new too; so it just completely revised. Although the framework, you know, with the names of the tests is the same.

Q. Now as far as in your opinion, was this WAIS-IV just — was it a technological advancement or a theoretical advancement? How would you characterize that?

A. Well, it's — it is a theoretical advancement. Because prior to 1997, there is no theory in intelligence called "verbal performance." It just doesn't exist.

In 1939, it was new and it was valuable. And, as I said, from 1939 to 1980 to the nineties, there were theories of intelligence that were proposed. The Wechsler Scales did not adopt any of those. They just kept to that verbal performance basically out of tradition, and it is the widest used test of intelligence.

So publishers are in the business of selling tests, and people administering it were very comfortable looking with verbal performance looking at verbal's high, performance is low and looking at it this way with these two areas of verbal performance, so they kept it. But what happened is all the other publishers were coming up with new [676] tests that were focusing on four, five, six, or seven areas of intelligence. So when the WAIS-IV was developed, in order to keep up with all the other publishers of intelligence tests, they moved to their four factor model. So they were doing that to be more consistent theoretically.

Then structurally, they were being more consistent. Because with different data analysis techniques, factor analysis, instruction equation modeling, which is too complex to get into, but basically that's why they changed the actual items on the test.

So, for example, on a similarities test, when they — when you're going through the pilot and the tryout phase, that test could have 70 items. But when the test is actually published, there's only 18. You know, those were the best 18 that could be used to discriminate between people, and that's how they do it. So it's a very complex process, the development of the test.

Q. You had heard Dr. Krop testify. Did you review the I.Q. scores in Mr. Hurst's history?

A. Yes, I did. There was actually something that I think is on this next slide, which I think is important when we look at comparing scores from one intelligence test to another.

Mr. Krop talked the similarities test, how the items changed on it. There's a — so on the WAIS-IV, we [677] have a measure of similarities, and on the WAIS-III we have a measure of similarities. But if you go down a couple of slides — maybe the next one — this is a quote from Dr. Weis (phonetic). He was the product manager on the development of the WAIS-III and the WAIS-IV, and this is an article that he wrote. It's referring to when the WAIS-R became the WAIS-III. There was a change in directions between the WAIS-R and the WAIS-III. Nothing else really changed on that test, just the way the instructions are given, a subtle, very subtle change in instructions. What he wrote in his article — this is where its published, The Journal of Psycho Educational Assessment, he writes, subtle changes to the instructions on the similarities subtest

may have changed the nature of the construct, meaning the area of intelligence that we're measuring, thus comparing the WISC and the WISC-R similarities scores, that similarities test, is like comparing apples and oranges.

So what he's saying here is — this is the project manager of the WAIS-IV — he's looking back to the WAIS and the WAIS-R, the WAIS-I and the WAIS-II and he's saying — I'm sorry, this is the WISC, the one for kids. They have the same names for the tests. He's saying that just making subtle changes in the instructions can change what we're actually measuring when we look at intelligence itself.

[678] When we look at the difference between the WAIS-III and the WAIS-IV, we're not making subtle changes in instructions, we're making substantial changes in instructions and administration in scoring and in items. So it is like comparing apples and oranges.

Having said that, in practice, we still compare them, but we have to keep in mind we're really kind of comparing apples and oranges. We can't compare them directly.

Q. Just to make it clear, the WISC is what?

A. The WISC is the WAIS for kids.

Q. Okay.

A. Yeah.

Q. So when you compare — when you compare those of Mr. Hurst, how do you view those as far as the differences between them?

A. Well, this example with the WISC is just talking about being able to compare one intelligence test to

another. So comparing one score on the WISC-I to the WISC-II — and I'm using that as an analogy to compare scores on the WAIS-I to the WAIS-II to the WAIS to the WAIS-R, from the WAIS-R to the WAIS-III or, in this case, the WAIS-III to the WAIS-IV. We just have to have a lot of caution in comparing.

So if we go to — go down a couple of more [679] slides, and it says Timothy Hurst's score.

Having said that, we do have Mr. Hurst's scores on the WAIS and on the WAIS-III and on the WAIS-IV And now I just have this next slide — just remember that on the WAIS-III, we're looking at measuring two areas, you know, the Ford and the four doors to get the full scale I.Q.

And then on the next slide, we see that he has a verbal score of 78 and a performance score of 83, and his full scale score is 78.

Q. That was on the what?

A. This is a WAIS-III in April of 2004.

Q. Now how does that compare to Dr. Krop's WAIS-IV that was given a couple of months ago?

A. The next slide is the WAIS-IV. And, again, it has four areas. So we have the Ford, the four doors, the truck, and we find out the miles per gallon on it; so we get more information.

So we go to the next slide. We see that on the WAIS-IV, we were able to measure more areas of intelligence and improve the tests that are being used. We find that we now have a verbal score of 68. This is called "Perceptual Reasoning Index," a 75. Working memory is 77, and processing speed is 68. And the overall I.Q. score is 69.

Q. Hold on. On the processing speed, did you [680] mean 86? You said 68.

A. Eighty-six. I'm a little nervous.

Q. Now, as far as the breakdown on his I.Q. scores, can you tell us how this — what value this is as far as the comparison?

A. Well, it provides us information, you know, by understanding what is being measured by the intelligence tests over time. So we see that in 2004, using the test that was available, we had two factors. And on that test we had a verbal score of 78 and a performance of 63, and that leads to a full scale of 78.

When the test was developed using a — using theories of intelligence as the blueprint for the instrument and revising the test and also measuring more factors to get more information about intelligence, which provides us a more accurate measure of intelligence, we have an intelligence score of 69.

Q. That 69, does that score in the mentally retarded range?

A. Yes. We call it "mentally deficient, mentally handicapped." It is mentally retarded. Anything that is at 70 or below we use terms called "standard deviations." So it's two standard deviations below.

The average is a score of 100. So what happens, if you have a score of — if you're average, you [681] have a score of 100. If you're gifted, you have 30 more point, so you have 130. If you're mentally handicapped you have 30 less points, which is 70. So it's equal on both ends.

So somebody who is mentally handicapped is scoring as high or higher than two out of 100 people. So

that means if you were to lineup 100 people, he's be the second. So there's 98 people that are going to score higher than him, or we might say, smarter on an intelligence testing he is.

At the gifted range, that person will be at the 98th percentile out of 100 people. They'd be number 98. So only two people are higher than them in intelligence, but they're higher than 98 out of 100. So it's balanced on both indicates of what we could call "gifted range" and "mentally handicap range." So it's perfectly balanced.

Q. And as far as the I.Q. scores, that's only one aspect of what you look at in an evaluation to determine whether someone is mentally retarded?

A. Yes, that's correct.

Q. You look at the adaptive functioning, correct?

A. Yes. I have another slide I put together — on the next slide — his school age tests. This was off of some paperwork I received from you.

Q. This was from the school records that you [682] reviewed?

A. Yes. And we have — these are on the same scale as an intelligence test, so anything — average is 100; gifted is 130; mentally handicapped is 70. We can see that these are all in that range.

Now these were not intelligence tests, these are tests of language and different things, but they are all depressed is we call it. We are seeing depressed scores.

These are back in 1988, so they weren't the — the tests we have today are much better. They'd be much more improved. The scores would be different. Some

of these would only be — would only have, you know, one or two tests.

So if we look at the slide that had the liquids, you know, there might only be two tests to measure a liquid or one test to measure a liquid, depending on which one of these we are looking at.

But it is giving us an understanding that in school he was functioning at a very low level, which is consistent with his current score on the WAIS-IV.

Q. Is it significant that Mr. Hurst age was under 18 whenever these school age tests were given?

A. Yes, it is, according to the statutes that I read.

Q. Okay.

[683] A. We want to see that — we want to know what his level of functioning was prior to age 18.

The score we have on intelligence today was from January, so we know that in January he's scoring the mentally handicapped, mentally retarded range.

For the law, the law says, okay, what were his scores like when he was in school. And we're finding that, looking at the school records, his scores are pretty low in school. They were consistent with somebody who was intellectually deficient while they were going to school and had lower levels of achievement and language.

Q. Now as far as the adaptive scores, did you review adaptive scores?

A. Yes, and that's the next slide.

Q. Are they concurrent, though, with the level that we've been talking about of the intellectual functioning?

A. They are actually lower. They're lower. They're lower. And so —

Q. Is there anything significant about it?

A. Well, it's — it's significant in that we're looking at somebody who had a very difficult time communicating with others, socially interacting, taking care of himself.

On the next slide I put together scores that I [684] received from this was — these were furnished by — Dr. Krop, I believe, administered these or someone who worked for him, I believe. We have Mr. Hurst. This is a self report, so this was him expressing using a test that was developed the same way as an I.Q. test where there was a standard — a normative sample. So a bunch of people that were used to develop the items, to score the items, and then in an interview, Mr. Hurst's scores — Mr. Hurst's responses are being compared to that group. That's what I mean by "standardized test." We see that his scores were all very, very low.

This is Tina Hurst, his sister. Again, very low.

Mr. Bradley, I believe. This is the father, I believe; I'm not sure.

And also the mother — the step-parent and mother.

What we're seeing is a lot of consistency with the scores. These people were interviewed separately. You don't sit in and, you know, listen to each other's responses. It's an interview format, and the people answer questions. And we have a lot of consistencies showing that Tim was pretty impaired when he was functioning in the real world.

When he's — compared when he's looking at his [685] own functioning today, he appears to be very impaired as well as far as self-caring and taking care of himself, communication.

Q. In this assessment system that Dr. Krop had mentioned, the ABAS, is that something that's generally accepted in the psychological community to determine someone's level of adaptive functioning?

A. Yes. The idea here is that if you are mentally retarded or mentally handicapped, it's not just going to show up in intelligence, it's going to show up in your daily functioning. So this is saying, hey, in my daily functioning I'm doing pretty poorly as well.

Q. Okay. Now as far as — what is a standard deviation of discrepancy?

A. It's a mathematical formula that — it's not necessarily used for the intelligence tests. It's used to compare two tests. So if I have Test A and Test B and I have a score on Test A and I want to predict without giving Test B what a person's score is going to be, I can do that if I know the correlation between the two tests. That means what the relationship is.

And so the standard deviation of discrepancy is used to predict a score on Test B when you know the score on Test A.

Q. So what would you expect to see as far as in a [686] standard deviation between the WAIS-III and the WAIS-IV?

A. I calculated that for the WAIS-III and the WAIS-IV. Now, it's important that I also — let me clarify this. We look at comparing intelligence tests like the WAIS-III and the WAIS-IV. We're comparing apples and oranges; we're not comparing the same

thing. But psychometrically looking at data, we can say, okay, if you have a correlation of "X," what would we predict the score to be just hypothetically speaking. Just based purely on math, it could be achievement test, it could be a language test, it could be a vocation test, it could be an intelligence test. So when we look at that on an intelligence test, we see that there's 95 percent confidence that the score will vary by about 10.38 points.

Now, historically, we all know in psychology that because intelligence increases over time, when you go from old version of intelligence test to a new version of intelligence test, we're looking at scores really going down; we're not looking at scores increasing. Especially when you're looking at more areas of intelligence being measured, you might have some more variability where we might not be tapping an area on the old version, so we could see peaks; so scores could go up. But generally speaking we're looking at scores to go down.

But this formula is indifferent to direction. [687] So if we have a score on the WAIS-III, which I believe was — going back on the WAIS-III, we have had score of 78. So we're 95 percent confident that an individual's score on the WAIS-IV would be plus or minus 10 points. So it would be either 88 or 68. That's the range we would expect to see.

Now, additionally, when we look at measuring intelligence over time, we don't measure it perfectly so we have what's called a "confidence interval." So we have like another range we would look at, which is about plus or minus five points. So when we look at it that way, you would make it 15 points with the standard area of measurement. So then it would go up to

about, what, 93 down to 65. So, you know, the range becomes bigger when you do that.

But just looking at it purely from a mathematical concept where it's a formula that's indifferent to what's being measured, it's indifferent to tests and it's indifferent to anything. It just saying, okay, what's the correlation, here's what you would expect the score to be, and it's plus or minus 10 points.

So when you look at that formula, the score on the WAIS-IV is within the expected range.

Q. Did you review the testing on the WAIS-IV that was done by Dr. McClaren?

A. I was deposed, and I was informed that Dr. [688] McClaren administered a WAIS-IV. I did not — I wrote down the scores during the deposition, and I didn't do anything else with them.

Q. Would you rely on that test?

A. No, no. The WAIS-IV was — it's very clear in the manual we have standards in psychological practice. This is — there's something called the "Standards of — "Standards of Educational and Psychological testing," which is a book that was written jointly between three major organizations, American Psychological Association, American Research Educational Association. And what happened is, it provides a guide to — for test publishers to use when they're developing a test, and it provides a guide for test users to use when they're administering scoring or interpreting tests. According to those guides, you would not administer the same intelligence test within a short period of time.

When you look at the manual of the WAIS-IV, it's very clear that you should not administer the test within a short period of time. And I believe what happened

was that inadvertently — this was not done on purpose, I'm sure. Inadvertently, the WAIS-IV was administered twice. So it was given in January and it was given in February. Well, it shouldn't have been given in February. We have what's called "practice effects." It's like if you were — [689] these are tests, so have you ever taken and test in the classroom and walked out and said, oh, you know, I missed that item and then looked it up or wondered what it was and you thought of the answer? Well, that's what happens when people take intelligence tests, too. They know when they get something wrong and they'll think about it and wonder about it. Or there's some things that they're having to use a pencil and draw a line or mark a picture. And so you have a practice of doing it, of looking for a particular shape. Or there's another test that's asking you to remember digits, and it's things that we don't normally do because digits are spread apart by one one-second. So if I were to say, tell me these numbers back, four, eight, nine, six. Well nobody does that to you. They don't give them to you one second apart. But when you take an intelligence test, they do that. So the next time somebody was to say it to you, you would be a little bit better at it because you've had practice. These are called "practice effects."

So because of practice effects, which, according to the manual, will last on the WAIS series — the manual was published at the same time as the instruments. So the instrument was published in 2008, and it hasn't been tested by researchers in the field. So what they wrote in the manual is previous versions of the Wechsler Scales have shown that there's practice effects that last for up to two [690] years. And so for about half for the verbal scale, it was — it lasted for a year. And on the performance scale it was lasting for

up to two years — between one and two years. So the recommendation is not to use the test for that — for at least a year.

There's a number of intelligence tests out there that can be used. The Stanford Benit is approved by the State of Florida, which can be used.

As Dr. Krop said, there's supplemental tests. For example, we saw about eleven tests that were used to compute full scale I.Q.

The publisher also gives us additional tests that are not used to calculate full scale I.Q., but are there for different purposes, different clinical purposes. And because they were not administered, those would be fine to administer. But you don't want to administer the same subtest again within a short period of time. The reason is, for example, in education we use an I.Q. score to make decisions and making placement decisions. We're deciding is this person learning disabled, is this person gifted, is this person mentally handicapped. So we're relying on that I.Q. score to make placement decisions.

In the real world, we're looking at I.Q. scores to make training decisions — will we hire this person, will we not hire this person.

[691] In this case we're using an I.Q. score to decide is this person going to live or going to die is the question that's being to asked. So you want to use a valid score to do that, and so that's why I did not give the second administration any thought except, you know, I was asked about it and I was given the scores and I wrote them down. But I have not included them because it goes against the practice of the standards of educational and psychological testing, which is what the

WAIS-IV manual is based upon. It goes against best practice to use them for interpretation because they are not valid for interpretation. It's not a valid measure of I.Q. The Wechsler Scales are not used as a behavioral instrument to see how somebody is going to act when you test them. It's not in the manual. There's no use for the second administration. It was just an error that was made.

Q. Now as far as the — did you personally meet with Mr. Hurst?

A. I did, yes.

Q. And what did you do when you met with Mr. Hurst?

A. I spoke with him for a while and I administered tests of achievement.

Q. Okay. And while were you doing that, did you observe his behavior?

[692] A. Yes, I did. I did.

Q. And based on — based on what you observed during the test-taking, do you think that Mr. Hurst put forth his best effort?

A. Absolutely. There's — first there's a difference between achievement and intelligence. And I think — the next slides talk about intelligence. But achievement is things like math, reading, and spelling.

So when I was giving him a math test — there's two math tests. On one of them, about halfway through administering the math test, the examiner is required to give the examinee, the person taking the test, a piece of paper. Remember when it's standardized, everybody has to do it the exact same way. It's like on Item No. 22, you give them the piece of paper and you give

them a pencil. As soon as they are done, you take the pencil away and the paper away. It's very restrictive how you do this because we want to compare this person's score to everyone who took it when the test was being developed.

What Mr. Hurst did, which was very unusual, on the test called the "calculation test," where he's writing his answer, he has a piece of paper in front of him. He actually asked me for a piece of paper. And so that — I've given hundreds of these. I don't remember ever being asked for a piece of paper on a calculation test. One reason is **[693]** you have a piece of paper you can write on. Because the test, you're writing on it, so you have a piece of paper, which is kind of is an indication of lower level functioning but also an indication that he was trying to do as well as he could. I just had a thought about that. So I have his work on the front page of this protocol and, you know, it's showing him doing the calculation that he literally could have done right next to the item.

So this was a page he was working with, and you can see you can easily right on there to help you calculate. But he actually wanted a piece of paper, and he wrote on the front.

He was — there was a writing sample question. It was — it's a bit sad anyway. But the question was, name three things you would like to do on vacation. His response was, Wow, I never thought about going on vacation let alone three things I want to do.

He was putting forth effort, he was concentrating, he went back, he corrected his answers. He had good attention to the task. He — like I said, there were a couple of instances he moved from one item to the next.

He went back and corrected a previous item. It was very clear that he was trying his best.

Q. Did he provide you with any information related to the testing, such as taking other tests or [694] practicing or doing any other activities that could have influenced the results of the test that you gave?

A. Yes. He — he said that he was not able to read when he went to prison. While he was there, he asked an inmate for help and that he learned to read while he was in prison by using his finger and going along each word and breaking the sounds down. He said the person who helped him was — his name was J.C., a.k.a. — he didn't say "a.k.a." But his name here is Money Red. That's what he was called, Money Red. He's my best friend. He's given me reading books, and I try reading books. I read the Bible. He gave me a science book; it's too hard. But I've learned how to read.

Q. So what test did you end up administering?

A. I administered the Woodcock Johnson Test of Achievement, Third Edition.

Q. What's the difference between these achievement tests and the intelligence tests that we've been talking about?

A. Let me see. I think — hold on one second. If you can go on to the next slide.

When we talk about achievement tests, we're talking about reading, writing, spelling. When we're talking about intelligence tests, we're talking about something different. It's a totally different concept. And [695] so if you go to the next slide, we're talking about intelligence tests. This is what we're actually measuring when we look at intelligence tests. We look at — what I'm talking about here are those big circles of liq-

uids. You know the soda circle and the syrup circle? Here I'm talking about the verbal, the PRI, the working memory and the processing speed.

One of the areas is holding information in our minds and then doing something with it. That means, when I ask you about — when I gave you those digits that were separated by a second, you were holding them in your mind. You were using this. That's what that is. It's called "working memory." So we're measuring that as an area of intelligence.

If you go to the next one, it's storing and retrieving information. This is like if you would have committed to have those numbers to memory and stored it, okay, then it would have left your working memory and gone into long-term retrieval.

Another example is when you look at someone's face and you go, oh, I know your name. It starts with a "D," but I just can't get it. We stored it, but we're having a hard time retrieving it. So we're looking at the storage and retrieval of information.

We're looking at high order thinking is **[696]** basically what intelligence is, high order thinking. Not casual interactions, a real high order of conscious thinking.

The next one is novel problem solving. This is trying to figure out something that is really out of our awareness. Something we don't have a lot of experience with and having to really concentrate and figure it out.

The next one is visualizing and thinking visually, creating pictures in our mind and kind of thinking with the mind's eye. How we might think with our mind's eye.

The next one is the efficient processing of information. This is processing speed, and this is the easiest of these areas. It's looking at your mind and saying if your mind is made of gears, it's actually made of neuro pathways. It's really how efficient are your neuro pathways. So another way of looking at it here is, if you have gears that have teeth and they interact with each other and they spin, they go "shhhh," are those gears well-oiled or is there sand in there where it's going real slow. So how fast are you able to process information.

The idea is that we have a limited amount of mental energy, and the faster we're able to process information, the more information we can process.

Then the next one is acquiring and learning [697] information. This is kind of culturally saturated and it's kind of a funny thing. An example of this is when you're a kid going to school learning your multiplication tables and you're asked "what's two times two," you're having to think about it. So you're having to go into your long-term retrieval to get what's two times two.

Then in second grade you have to do those multiplication tables fast. So what's two times two, and everybody can now say four. It's automatic. So we called that our "acquired knowledge."

Another example of this is, if I ask you, did Christopher Columbus discover America. True or false. Culturally, we have two answers to that question, don't we? We know it's not true, but culturally we're taught that he discovered America. So this is all a part of that area of intelligence, too. Our acquired knowledge, our stored knowledge. That's related to our culture.

So these are the areas of intelligence that we're measuring with intelligence tests. So it's much different than what we're measuring with the test of achievement.

Q. Okay. So could you expect a person with — that was mentally retarded to have achievement scores above or below their measured I.Q. scores?

A. Well, most psychologists would say that they [698] would expect that an individual with an I.Q. score of let's say around 70 would score at 70 or less. But it's not really supported with the data to do that.

What I was — what I was kind of wanting to show here is what's involved in how our thinking impacts our everyday life. There was a question about executive functioning that came up before with Mr. Krop where we look at how is intelligence being applied. And really, we're looking at these high order of thought processes and —

Q. Is someone that mentally retarded just totally nonfunctional?

A. No. Like each one of these areas of processing are impaired, so their ability to store information is impaired. Their ability to process information quickly is impaired. Their ability to hold information in their mind and do something with it is impaired. And so it's important to see, you know, what that impairment would look at in everyday thinking and in everyday activities. And —

Q. So how does it impact them in everyday thinking and everyday functioning?

A. If you go down two slides, I have — basically when we look at executive functioning and — which is very encompassing and includes things like attention,

focus, concentration, all the things that we do to be diligent when **[699]** we're working and thinking. We look at — there's basically, according to the literature, three areas. There's not a common nomenclature. There's not common used across different areas of study from psychology to neuropsychology to neuroscience. But there's the same concepts across these three areas, and they could be grouped according to these three different neuro pathways. If you can click the down button once. The first one is the central executive, which uses those areas of intelligence I just talked about on the previous slide, and this is what I call "the thinking brain." It's out purposeful thinking. It's what I'm using right now. I'm thinking. I'm concentrating about what I'm saying. I'm holding information in my mind. I'm retrieving information that I've previously acquired. I had an idea of what I wanted to say, what's on these slides. I'm incorporating all of that information. It's a high level thinking, concentration, attention, and focus that I'm going through right now, and that's what we're doing in a situation like this.

And then there's another area of the brain — another network, if you go down, and this is the default network and that's the wondering brain. And the wondering brain is when we're driving in our car and we're just thinking about nothing and we're just — there's thoughts coming to us. It also — because we can't stay in that **[700]** thinking brain for very long, I mean, at the most fifteen minutes consecutively, what happens is this wondering brain will pop its head up even when we're trying to think and you may find, if you're saying, oh, what did he just say, because you went into your wondering brain. You were trying to be in this thinking brain, but, man, you went in this wondering brain. And what made you go into the awareness of what did

he just say is this next one called the "air traffic controller" which is a salience network. What that does, that network moderates between your thinking network and your wondering mind. And what it's doing is it's shutting off your wondering mind so you can concentrate. And then what happens is, if you're not concentrating, the air traffic controller goes hey, pay attention.

Or it could be that you're just wanting to relax. You're at home and you don't want to think about work any more. You don't want to think about what happened at the office and concentrate and use your thought that way, so the air traffic controller will turn off your thinking mind and let your mind wonder so you can relax. So our mind is always going, so you have an interaction between these three areas.

So someone who is mentally handicapped, what happens is the central executive, the thinking brain is impaired. Their air traffic controller is also impaired and [701] their relying a lot on that wondering brain. It's just happening a lot. Because if the air traffic controller — when the air traffic controller gets the thinking brain involved, it's not that well-developed. So that wondering mind keeps popping back up because there's an inability to concentrate, focus, and engage in higher thinking. It's a complexity beyond that individual's awareness, which is why we see a low score on the test of intelligence.

So if you go down a little bit. Refocusing attention as to what's going on around us when we are distracted, which I already said. And shutting down the wondering mind so we can activate the thinking mind. This is just ongoing for all of us as we're sitting here in the

courtroom or we're at home or at work. This is normal brain activities.

So if you go to the next slide. For sustained purposeful thought for planning and activity, the communication between these three networks needs to be efficient. So in order for functioning network and functioning in life, these three networks need to be intact.

What science has found, if you go down to the next line, is an individual with Alzheimer's Disease, autism, bipolar disorder, other forms of cognitive impairment, like mental retardation, have inefficient purposeful goal directed thought and behavior.

[702] For mentally retarded individuals, this would be seen as being susceptible to the negative influence of others, the positive influence of others, poor decision making, confusion, or immature thought and behavior. It's very easy to rely on the thinking of others because their thinking and their neuro networks are not as integrated or not engaged as developed communication patterns as a typical brain. And when the neuro networks that are involved in thinking are activated, they are impaired as well. So its very easy for them to default to others, and the show is being less mature because they are not as complex cognitively and their thinking isn't as complex.

Q. And when you're saying "cognitively," what do you mean?

A. Intellectually, intellectually. And also broader we're going beyond just intelligence. We're looking at sustained attention. Evaluating where we are, we can call that meta cognition. How am I doing working on this project, am I listening, am I paying attention well, am I doing a good job, am I typing this up, am I draw-

ing this well. Just kind of reflecting on our own thinking.

Q. Now, as far as when you — you had started leading into it a little bit. But as far as when you give these achievement tests, what do you expect as far as how they correlate with the I.Q. tests?

[703] A. If you go — keep going a couple of slides.

This was actually developed — some of these slides by a fellow by the name of Kevin McGrew, who's an author of a Woodcock Johnson Achievement Test, the test that I gave to Mr. Hurst. The idea is, what would he expect an individual at the full scale I.Q. of 75. Now Mr. Hurst has 70. These were developed many, many years ago, probably around 2001. But it's looking at an I.Q. score of 75, and it's based upon the normative data of that test, which I'll go into.

But what's important is, when we think of mentally handicapped individuals or mental retardation, we may have an idea in our mind that we're thinking of somebody in a wheelchair that's sitting there and is drooling. They can't sit and they can't function.

But realistically when we talk about mild mental retardation, we're looking at somebody like Forrest Gump. So it's really more of a Forrest Gump idea that the person will appear just like everyone else. You can't tell a difference by looking at him. You can't even tell by engaging in casual conversation. It's only until you get into really in depth questioning. You know, who is the vice president; who is the secretary of state. You know, and questions that are just not dealt with on a daily basis, on a traditional basis where there's a lot of repetition. I [704] think that's an important point. The difference between a person between a gifted person

and a mentally handicapped or mentally retarded person is really repetition. A gifted individual will learn information quickly, will not need a lot of repetition.

The typical average person needs things repeated about seven to 14 times to understand or to learn it — about seven to 14.

The mentally handicapped person needs a lot of repetition. So if we look at it as a meal, it's like having a salad, an appetizer, potatoes, vegetables and an entree. When a mentally handicapped individual is receiving instruction, you just focus on the entree, and you repeat it, repeat it, repeat it. Just a lot of repetition. So it is an individual who does not look unusual and who just needs a lot of repetition in order to acquire information. But, again, their thinking is impaired but they can learn to acquire information over time.

So the question is, should his reading score be higher or lower or the same as his I.Q. score of 75.

If you go to the next slide. The way — the Wechsler Scales were derived out of 2300 people. The Woodcock Johnson was derived out of 8800 individuals. It was a much larger sample based on the 2000 census.

So the Woodcock Johnson has an achievement [705] test, which are math, writing, and spelling tests. And it also has a test of intelligence, which is like the WISC.

What this gentlemen did, who is coauthor of the test he looked, is he looked at individuals in the normative sample, in that sample 8800, that had an I.Q. score around 75. And I say around 75 — if you go to the next slide, I just have to include this just for professional accuracy. It's a little bit more complex than where we are.

But what happens is, if you have a family that has somebody that is born and they are very, very tall, and they have second child, more than likely that second child will be shorter.

If you have a family and the first child short, below average, the next child will probably be taller. It's called regression to the mean. Over time, everything kind of goes towards average.

So when you have someone who has a high score — let me see what I did with my pointer. I don't know where my pointer is. If you see the 115. Remember we said that a hundred is average. So if you have over average, you're at 115, on another test that's given you're probably going to go down a little bit. If you have a low score below average and you take another test, more than likely your score is going to go up. It's just a [706] psychometric property.

So when we look at somebody who has an I.Q. score of 75, you want to also — and we're going to give an achievement test, you want to count for that regression towards the mean. So in this data analysis, he used 85 and also took into consideration that measurement error confidence interval that I talked about, which is about five points. And because regression towards the mean took five points plus, he took five points minus. To make a long story short, he took 70 to 80, okay. So it's based upon people who, on the Woodcock Johnson Cognitive Test, the test of intelligence, who had intelligence scores between 70 and 80 is what this next slide is based on if you go down. I would really like to find that pointer. There it is.

So these are individuals out of the norm sample. So out of the Woodcock Johnson III test of cognitive abilities, which is like a full scale I.Q. on the Wechsler

Scales, if you took everyone who had a score of between 70 and 80, and everyone that took the intelligence test also took the achievement test when these tests were being developed, so it's both achievement and intelligence test scores. So he said, what was their achievement score. So everyone who has an I.Q. score between 70 and 80, he wanted to know what their reading score is, and this is a graph of their reading scores.

[707] What we find is, psychometrically we call that a normal distribution. It's a normal curve. And basically it looks like it could be on either side of it, and it's pretty equal when you look at that time initially. But actually what we find is that there are more people scoring higher in their achievement than on their merit measured intelligence. So we started with that I.Q. score of 75. And then to be consistent psychometrically, he went from 70 to 80 just for best practice.

When we draw that line of 75, which is right here, we see that people's reading scores are higher and lower than 75. But we also see — and this is real data — that more people are scoring higher in achievement in reading than they're measuring in intelligence.

And if go to the next — again, this is used not for hearings like this, but for instruction to students and psychologists. Because what happens is many educators, administrators, and psychologists think that this figure reflects reality. That here is 75, that somebody who is mentally handicapped can only score at their achievement — at their intellectual ability or lower, and in school we have lower expectations of these folks. And what we're trying to say is that, you know, they think that this reflects reality. But a person with a low full scale I.Q. score can be expected to achieve at or below their I.Q. [708] score.

In reality, if you go to the next slide — maybe two slides — we see that that's not true. It's one of the problems with education, which is what we're not dealing with here. But it just goes with expectation where we expect to find somebody's level of achievement.

If you go back a slide, the reason is that achievement and intelligence, although related, it's not a perfect relationship.

So what makes somebody successful in school, yeah, is having — having a good I.Q. is really good to do well in school, and this is the overlap. It's about 40 percent of half of what makes somebody successful in school.

The other things are like, you know, when you do homework and need for achievement, what their home is like, their desire to learn, their attendance at school, their attention to task, their interest in school, their social acceptance at school. There's a lot of things that influence somebody's achievement beyond their intelligence.

So the point being made is that if you're wanting to predict achievement from intelligence, it's really fallible. So it's an error to look at intelligence and achievement as being one. And it's just a clarification that I think needs to be made when we start looking at [709] achievement tests.

Q. Now you said a couple of times, you've mentioned the word "psychometrically." What does that mean?

A. Psychometrically. That's means when we're using mathematical formulas that have like the square root sign and algebra and calculus and these things that

I wouldn't be using if I wasn't, you know, working at the university.

I earned a P.h.D at University of Florida, but I was working as a school psychologist. I didn't use them. But now that I'm working in the university, I'm using them and things that, you know, people who deal with mathematics and research would use. Just formulas and statistical analysis programs.

Q. Now what was the results of Mr. Hurst's score, and were they consistent with what you would expect from his I.Q. score?

A. They were. There's a score that I'd like to explain first before I go on that I also have on him that people aren't familiar with. If you go one more. It's called "academic proficiency," and so we had that standard score, which has the average of 100. Remember somebody is gifted if they have a score of 130; they are mentally handicapped if they have 30 less than 100. That's score is 70. That's a standard score.

[710] A standard score is giving us an idea of how often — let me step back a second. When we add up scores on an intelligence test, we have lots of ones and zeros. Those ones and zeros become a total score, which we call a raw score.

A standard score lets us now how often a raw score is observed. So when we have a score that's a standard score of 70, we know that it's seen in about two percent of the population. How often it's seen, it's seen in two percent of the population. So out of 100 percent, two percent will demonstrate it.

On the gifted end, we know that 130, it's not seen in 98 percent of the population. So it's at the 98th percen-

tile, so it's how often it's seen. It really doesn't tell us how good their intelligence is at the proficiency of it.

So there's another score for academics that we use for academic proficiency, how proficient are you with the academic curriculum, and it's a very important score.

If you go on to the next slide, it's kind of like a — you know, going to the eye doctor and you have that 20/20. You have 20/20 vision, you have 22/100 vision, and its giving us an idea of what our vision is.

So if you go to the next slide. When we look at academic proficiency in reading comprehension — again, [711] academics are reading, math, and spelling, not intelligence. We look at reading in second grade, what are some typical skills that we using in reading? I have this as a question mark because I use it in class. But if you go to the next slide, we have things like reading fluency, how fast can you read; can you read a whole word; what is your ability to decode sounds, to decode syllables, et cetera. These are basic skills that we have in reading in second grade.

And so if we think that there's six subskills that are necessary for typical reading in sixth grade, we can — go to the next slide. We can look at a cookie jar and say that each one of these subsidies are a subskill. So this could be reading decoding. This could be fluency. This could be a sound symbol correspondence in just one of the six areas.

When we look at this, we would say that somebody has — if you go to the next slide, click one more time — that think have 90 percent proficiency. So in the curriculum, the way this test is derived, that it's based upon an individual having 90 percent proficiency. And

this is really kind of an instructional level. It seems like it's high, but if you think of laying in bed at night reading a book, if you had 90 percent proficiency when you're reading your book at night, you would know nine out of 10 words, which would mean that you would know one out of [712] every 10 words you read when you're laying in bed reading at night. So there is a level of frustration involved at 90 percent proficiency.

So this is what we would call an instructional level. So they have enough cookies or enough subskills to progress with the curriculum.

If you go to the next slide — go one more — let's see. Go to the next slide, if you would. So now the question is, what if you only have three out of the six necessary subskills? What's your proficiency compared to what is typically demanded? You're going to be impaired. You don't have the subskills to be successful in class. You're going to have academic frustration.

If you click down once — twice, you would have a proficiency — instead of 90 over 90, you would have a proficiency of 45 over 90. If you had all six subskills, that 45 would be a 90, which was on the other slide I passed. I was just trying to be a little bit faster.

So what's a typically expected is 90 percent proficiency academically, and a typical achieving student will have between like 75 and 90 right here.

If you only have about half the skills, you're going to have about a 45 over 90. So it's going to show impairment in your proficiency with the curriculum. And so I just wanted to explain what that score was before I [713] provided it.

If you go to the next slide, we see that in 2004 he was administered the Wide Range Achievement Test

III by an individual, and he had a score in spelling of 77; in reading of 77; and in arithmetic of 75, which means he scored six out of a hundred, and six out of a hundred, and five out of a hundred individuals.

In — on Valentine's Day in February, 2012, I went to visit Mr. Hurst and administered the achievement test, and these are the scores that he received.

On the Woodcock Johnson you have the standard scores, which has that mean of 100, and a 70 means in the retarded range. We also have the proficiency scores on the Woodcock Johnson, which are very valuable to evaluate achievement. And we see that in broad reading, that when a typical student would be expected to have around 90 percent correct, he's getting eight, so we're looking at very limited proficiency.

When we would expect 90 percent in reading comprehension, we're seeing 23 percent proficiency, which is very limited.

In math calculation he did better, and we're seeing proficiency around 67, which is limited to in the average range.

And in math reasoning, we have proficiency, [714] eight out of 90 and 32 out of 90. And so overall, what we're seeing is consistent with what we would expect looking at the data on the Woodcock Johnson Achievement Test, that for an individual given an I.Q. of 70 would be achieving higher than 70, and we're seeing that. We also have Mr. Hurst saying that he had practiced reading in prison. He's been in prison 24 hours a day learning how to read, and it seems like it's being reflected in his scores. You know, his reading score is going up between these administrations. His math

score is going up as well, and so these are his overall reading scores across time.

So again, when we have somebody that has an I.Q. score of 75 on the previous slides, where would we expect their achievement to be? It could be above or it could be below their measured intelligence. But when you looked at the normative sample of the Woodcock Johnson, you found most people are above their measured intelligence. And we're finding that with Mr. Hurst and we're also finding that it's elevated. Because remember, we talked about repetition. He's in prison; he's had instruction in reading. He's had instruction in simple mathematics. There is a canteen there where they have to pay money and you add and you subtract and you trade things apparently in prison from talking with him, that he's had practice with math skills.

[715] Now the math reasoning score down here is probably a little bit more reflective of where he was in school previously because this is a high order thinking. This is high order math. It's not as basically simple as, you know, like two plus two and other things that we've done.

But we could see that although — we see that we have scores within around 15 points of his measured intelligence, he's still very limited in his proficiency in academics, which is consistent with the school records. But we are seeing growth over time. And, you know, it's important for us to keep in mind that people can learn, can progress with enough time and with repeated instruction.

Q. So did — in all of your review of these materials, did you come to a conclusion as to whether or not Mr. Hurst was mentally retarded?

A. Yes. I looked at — according to the statutes I was given, we look at measured intelligence being two standard deviations beyond the mean, which is 70 or less. We have the score on the WAIS, which is clearly the best score that we have on a measure of intelligence. We have adaptive functioning, which is his daily taking care of himself, interacting with others, social skills that the parents completed and he completed called the "ABAS," which were also impaired. And then there has to be onset before [716] age 18. For that, I looked at the school records. I looked at the — I also used the adaptive behavior scores for information, and I also used anecdotal information that I received from a former vice principal. I received a statement from him, a statement from his sister just describing his activities, and that specifically the vice principal said that he was not surprised that he's mentally retarded and that he should have been in a special education class. So with those three areas, he does meet the legal criteria for mental retardation.

MR. DOSS: No further questions, Judge.

THE COURT: If you'll approach, please. I do not need the court reporter.

(Bench conference held off the record).

THE COURT: All right, members of the jury, I anticipated that this would end a little sooner than it did, and that's my mistake. My apologies to Mr. Molchan. I normally don't like to break, but I had y'all's lunch moved up to 12 today.

Is it out there?

SECURITY OFFICER: It just arrived.

THE COURT: Normally I like to complete a witness in their entirety. But because of the fact that I

misjudged timing, I'm going to break now for lunch now. In case any of you got hot meals, I don't [717] want them to get cold.

And when we come back, Mr. Molchan, I will certainly allow you to do your cross-examination, and then we'll finalize with Mr. Doss.

All right, you're excused for lunch. Why don't we say 1:15?

SECURITY OFFICER: Yes, Your Honor.

(Recess)

THE COURT: Dr. Taub, if you want to come back and get on the stand.

Is there anything we need to take up before we bring in the jury?

MR. MOLCHAN: No.

THE COURT: Bring in the jury.

(Pause in proceedings)

(Jury present)

THE COURT: Let the record so reflect.

Everybody please be seated.

Dr. Taub, you were previously placed under oath; you are still under oath.

Mr. Molchan, you may proceed.

MR. MOLCHAN: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. MOLCHAN:

Q. Good afternoon, Doctor.

[718] A. Good afternoon.

Q. I want to go back through a few things, and I may have missed it.

Were you also provided with Dr. Riebsame's data? Does that ring a bell with you at all?

A. No, it does not. No.

Q. Okay. So if there was testing by a Dr. Riebsame back in 19, I believe it was, 81, you didn't have that?

A. No. No, I did not.

Q. Now, just — I want to make sure I understand something with respect to the WAIS-III. Now, how long was the — the WAIS-III was basically used for, what, over 30 years? Would that be a fair statement?

A. Well, the WAIS Series has been in use since 1939. The WAIS-III was published in 1997. So it went from '97 to 2008.

Q. Okay. I misunderstood that.

A. Sure.

Q. And basically, there's a lot of folks that had input into the WAIS-III?

A. Oh, yes.

Q. Some very intelligent people?

A. Yes, yes.

Q. And it's not your testimony that basically we [719] should discount totally the WAIS-III and its testing?

A. Actually I published an article on the WAIS-III. There are concerns with the scoring of the WAIS-

III, which a psychologist interpreting results does need to use caution. But it is a valid test and it is a valid score of intelligence, and there's no reason not to use that score if you attained it at the time that it was the test to use to measure intelligence.

Q. Now, let's talk a little specifics about the 1996 — let me make sure. Let me look at my notes here.

It was in 2004. Let's move on ahead when Dr. Larson tested Mr. Hurst.

A. Yes.

Q. And basically there was a score of 78?

A. Yes.

Q. Were you provided with the TOMM data regarding the testing that was done by Dr. Larson?

A. Let me take a look. I only have one report actually, and I do have a TOMM, yes. It says, total score of 25 — 24 and 25. The first trial 24; second trial 25.

Q. Now, if you could, just tell the folks what the TOMM — we're using the word T-O-M-M?

A. Yes.

Q. If you could kind of talk to the jury about that.

[720] A. Yeah. Dr. Krop talked about it. It was the test of malingering, which is if the person is trying to fake bad. It's a test that can be used to see if somebody is trying to fake bad, look like they're impaired when they're not. They might purposefully answer questions wrong.

Q. And basically, Dr — and this is administered after you give that first test? The TOMM is administered after you've done the intelligence testing?

A. It could be administered either way.

And it's kind of important to point out with the TOMM. The TOMM was not designed to test the malingering with an intelligence test. The TOMM was used in a clinical setting. So this is — we talk about the standards of educational and psychological assessment. This is not — the reason why that test was developed, through tradition it seems to have been used in legal proceedings when an intelligence test is being administered to see if somebody might be faking bad. But having said that, it could be administered before or after.

Q. Okay. However, Dr. Larson found a score of 24 and 25 on the TOMM.

A. Uh-huh (Indicating Affirmatively).

Q. Did you find — do you find is that significant in measuring his — I won't use the term [721] "malingering." I'll use the term — is that an indication of a problem with respect to maybe his efforts in taking the test?

A. Again, what I can answer regarding the TOMM, it's something that I don't use, and this is not really the purpose for the test to be used. He did administer it. I can read what he does write in his report, which is he had a score of 24 on the first trial and a score of 25 on the second trial. And he wrote that this is random responding as the test is a forced choice instrument. The subject must choose between two responses, one of which is correct. The items are much easier than they appear, and even significantly brain damaged individuals will score on the instrument. Given his I.Q. score, I would expect he would obtain a score of 45 or above on at least the second trial and

most likely on both. And, again, he scored 24 and 25 instead of 45.

Q. And Dr. Larson was of the opinion that it did not indicate that maybe he was putting forth his best effort?

A. What he wrote is, his score of 24 and 25 respectively indicate that he failed to put forth a reasonable effort in taking this test.

Q. I'm talking about the TOMM.

A. This is the TOMM, yes.

[722] Q. Now, I think you made a statement in respect to the adaptive behavior aspect of this testing that we go through with the mental retardation portion of it. I think you stated that you felt — or at least information had come to you that Mr. Hurst had difficulty in communicating, and that came from a number of sources.

A. Uh-huh (Indicating Affirmatively).

Q. That's correct?

A. It was not necessarily in communicating when we think of, you know, carrying on a conversation between individuals. It has to do with friendships and interaction with adults. Just a level and quality of communication.

Q. More or less the qualitative aspect of it?

A. Yes. In fact, I believe Mr — Dr. Krop went over some items. But you can tell by the items — it's things like irregular and plural nouns, knife versus knives. This is, you know, a very low level. It goes on to taking turns in a conversation, talk about realistic future educational or career goals where we're talking

about anticipating what's going to happen in the future, what my desires are, long-range thinking, answering complex questions that require thoughts and opinions, for example, questions about politics, current events.

So these are at the higher end where he scored lower, and then the easier end states his own name, his [723] telephone number, uses sentences correctly, knows his home address.

So it does go from very simple communication to more complex levels of communication requiring complex thinking. And there's only, you know, a few items that are used in the higher ends of the instrument just like, you know, most of them are in that middle range.

Q. Now with respect to the crime itself, you were not provided with information regarding the crime scene or police reports or a statement that he may have given — that Mr. Hurst was given?

A. I was provided with quite a bit of information. I was provided with the evaluation we just went over, some testimony, opinion from the Supreme Court, motions to vacate responses to motions to vacate State's responses, background material, homicide offense report, some school records, correctional union records. And I think in addition to these, there were some other records I was given.

Q. Okay. So you were provided with evidence about the crime scene itself? Or you did review — and did you review that?

A. I did, I did.

Q. So would you — the fact — or did you factor in evidence that the defendant basically chose to put the [724] proceeds of the money that he took at another lo-

cation at another house? Is that evidence — or is that an indication of a cognitive thought process?

A. I read that his thumbprint was on a deposit receipt with some money. I believe it was some money that — it was either a deposit receipt or a deposit receipt and money were found at Lee Lee Smith's house, I believe.

Q. Isn't that true, that that is a cognitive thought process if he takes the money and puts it away at another person's house?

A. I didn't make that leap. I just read it for the fact that his thumbprint was on the deposit slip. I didn't know at what point it became on the deposit slip, just that there was a deposit slip there.

Q. Maybe you misunderstood me, Doctor. Is that process of taking the money from one location, not going to your home, but going to another's home and secreting that, isn't that a cognitive thought possession —

A. Can I clarify your question?

Q. — when you know you've committed a crime?

A. Okay. We have somebody — to understand your question, you're saying somebody committed a crime. There was money involved. They took the money from a crime scene to another location; did that involve thought?

Q. Uh-huh.

[725] A. Yeah, it would involve a level of thinking. It wouldn't be a high order level of thinking, but it would involve thought to say money is valuable, I would like to have money, I'm going to take it with me and leave with it, yes.

Q. Well, let's take it even a step forward. If you had blood on your pants and you go and take those pants — go to another person's house after committing the crime and ask that person or tell that person to wash those pants, are we also then talking about some degree of an a intelligent decision being made?

A. Yes. It involves a lower level of thought to recognize that your pants are dirty and that they need to be cleaned.

Q. And after you've committed the crime, if you take evidence that was taken from the victim and take and have another individual take that and put it in a garbage can, is that again a cognitive level of thinking?

A. That would be a little bit higher level than washing your pants or taking money, I think, if you were to have material that is related to a crime, you have it with it, and you ask someone to do something with you to assist you with it. That would be a little bit higher than washing your pants or taking money, I guess.

Q. And again, I don't want you to misunderstand [726] me. I'm not saying that Mr. Hurst is the most gifted person from an intelligence standpoint.

A. Uh-huh (Indicating Affirmatively).

Q. But the fact is that there are certain things that come into play that should be viewed, and I want to make sure I have this in the proper context.

The process of having a job at Popeye's, did you look into and inquire into the level of what he was supposed to do and was required to do or did you have any information regarding that?

A. No. The only — having a job at Popeye's — I read it about it, and I also read about his having a driver's license as well, which are things that — an individual with mental retardation can have a job if it's repetitious. His driving, from what I read from the reports, was that it was very erratic and he was kind of scary to be with, that he drove very, very slow.

So it is — I think it's important. Somebody who is mentally retarded, again, they are not going to be drooling. They can engage in activities, daily life activities, but we wouldn't expect them to engage in more complex skills. For example, if — it would be much easier for someone to bag groceries at a grocery store than to be the cashier. Could they be the cashier? Yes. With enough training and repetition they can be a cashier because how we [727] have computers and it tell you how much change it is. But it would be a much more complex job to have.

Q. And it's all relevant to what he would be challenged with and be faced with would all — I mean, that would be part of the kind of question that would be coming at him?

A. And how long the training is.

Q. Correct.

A. How long the training and the number of steps required in the process of which he has to complete.

Q. Now, in talking about the WAIS-IV and kind of the idea, you would say that that is a much improved test over the WAIS-III?

A. Yes.

Q. Yet, I think going back in time, we thought the WAIS-III was a pretty good test at that point in time over the years?

A. Well, it was interesting when the WAIS-III was developed by — I mentioned a theory of intelligence by John Carroll that kind of put together a lot of studies on intelligence, and his theory was published in 1993. The publishers of the WAIS-III looked at that research and didn't apply it to the WAIS-III.

There were other tests that were published that were much better than the WAIS-III, so it wasn't [728] necessarily the best test. It wasn't necessarily even the best test today to measure intelligence, but the WAIS-IV is a much better measure of intelligence than the WAIS-III was.

Q. But in essence, this is probably one of the most complex areas that we get into when you talk about psychology and the question of intelligence, isn't it, Doctor?

A. The area of intelligence?

Q. Of measuring intelligence.

A. Yeah, yeah. Well, the WAIS-III — the WAIS-III measures two areas. We give it for the verbal performance. The WAIS-IV measures four. There's some tests that measure five, and there's other tests that measure seven areas. So we have the ability to measure many areas of intelligence, but it's just how many areas that the test publisher identified at the time that he was standardizing, collecting the data to collect the tests and get the scores for other people to compare and examine his score to that one group, those 2200 people.

MR. MOLCHAN: I don't have any other questions.

THE COURT: Mr. Doss?

MR. DOSS: Thank you, Judge.

REDIRECT EXAMINATION

BY MR. DOSS:

[729] Q. Dr. Taub, as far as what we rely on now, would there be any reason to rely on the WAIS-III scores rather than the WAIS-IV scores?

A. To make a decision today?

Q. Right.

A. No, absolutely not. The WAIS-IV provides us with the best measure of intelligence that we have. In contrast to the WAIS-III, it's based upon a theory. The WAIS-III was based upon the same suppositions that were started back in 1939 and haven't changed.

All of the tests were modified to provide better measure of those four areas of intelligence that the test is measuring.

And the other thing that's really important here, I think, in addition to that is that the test publisher is very specific in the manual that the WAIS-III was not able to discriminate. It's kind of interesting with I.Q. tests. What we're doing is we're separating people looking for individual differences, and the WAIS-III was not good as looking at individual differences in the high end. It couldn't really separate out the high functioning, the high — somebody that is superior intelligence from somebody who's gifted is the term that's used. A superior to a gifted level or somebody that's very high to superior to gifted.

[730] On the lower end, it wasn't as good at separating out somebody out that's borderline to mentally handicapped. So what they did is they added more items at high end to separate out those folks who are high functioning and added more items at the low end to provide a better measure of intellectual functioning. Because the test goes down much lower than 70, so it not only identifies mild retardation but severe mental retardation as well.

Q. Is there any reason that a TOMM taken in 2004 would have any bearing whatsoever on the I.Q. test that was administered by Dr. Krop in 2012?

A. No. The TOMM is not an intellectual measure either, and it's not traditionally — it wasn't developed to be administered with an intelligence test either. But something in 2004 would not be related to the administration that takes place in 2012.

MR. DOSS: Thank you, Judge.

THE COURT: May he be excused?

MR. DOSS: Yes.

THE COURT: Thank you, sir. You're free to go.

MR. MOLCHAN: We call Dr. McClaren. Oh, I'm sorry.

MR. DOSS: He knows what I'm going to say.

The Defense rests, Judge.

[731] THE COURT: Thank you.

All right. Come on up, Doctor.

(Witness sworn)

MR. MOLCHAN: If I could proceed, Your Honor.

THE COURT: You may.

WHEREUPON, HARRY MCCLAREN,
having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MOLCHAN:

Q. Could you state your name, sir, and spell your last?

A. Harry Albert McClaren, M-C-C-L-A-R-E-N.

Q. And what is your profession, sir?

A. I'm a psychologist specializing in forensic psychology, primarily criminal forensic psychology involving violent crime.

Q. And how long have you been in this profession?

A. I've worked in this area since 1975 and continuously since 1981.

Q. Now could you describe your educational background that you — that led up to your occupation?

A. Yes. I earned a bachelor of arts in psychology from University of Richmond in Virginia, 1973; a Master of Science from Mississippi State University in 1974 [732] in clinical psychology. I earned a P.h.D from Virginia Tech in 1981; worked intermittently in the forensic service of the forensic unit at Central State Hospital in Petersburg, Virginia both before I went back to get my P.h.D and at times during getting my P.h.D to earn money working in the forensic unit, alcohol unit, adolescent unit, where I was needed.

I served an internship with the Wisconsin Division of Corrections where I learned psychotherapy assessment. I had supervision for a year working at maxi-

mum security, minimum security prisons, a juvenile facility, probation parole office in the State of Wisconsin.

I was hired to come to Florida in 1981 to work in the forensic service at Florida State Hospital in Chattahoochee, Florida, and I worked there about two-and-a-half years and was eventually a clinical psychologist after I finished my dissertation and earned my P.h.D.

I worked in the behavior disorders unit where we had people that were not guilty by reason of insanity, not competent to stand trial, mental disorders, sex offenders as that was a legal class of people at the time — and prison inmates that were too sick to be treated safely in prison.

I also worked in their general psychiatric [733] division in the forensic service there.

I was hired to come to Alabama after that in 1983 to the Taylor Hardin Secure Medical Facility in Tuscaloosa, where the University of Alabama is, and became the chief psychologist directing evaluations and treatment of forensic psychiatric patients and some particularly dangerous patients from Bryce Hospital that couldn't be managed at Bryce Hospital.

I testified in courts in regard to mental issues in Alabama and Federal court while I was there for about 16 months. I taught at the University of Alabama, Psychology of Law and Justice.

Eventually I turned to Florida where the Corrections Mental Health Institution had been opened to treat severely mentally ill prison psychiatric patients, again, that could not be treated safely in a prison. So it was a hybrid institution where the exterior and part of the interior security was provided by corrections. The treatment and part of the internal security as far as re-

straining or preventing violence was often carried out by people that work for the then Department of Health and Rehabilitative Services that later became Department of Children and Families. So I became a senior psychologist there. I worked there from '85 to '96, and then started a private practice in forensic psychology, which is what I do [734] today.

Q. And have you testified in — as an expert in the courts as an expert in the area of forensic psychology?

A. I have.

Q. Approximately how many times?

A. Hundreds of times, if not over a thousand.

Q. Now, in this particular case with respect to Mr. Hurst, did you come to do an examination of Mr. Hurst in the psychological area?

A. Yes, I did.

Q. And basically, first of all, what information were you provided before you began your examination?

A. I was given a direct appeal that was accepted by the Supreme Court, a Supreme Court opinion granting relief. I reviewed some trial testimony that involved testimony of Mr. Hurst's family, people that knew him well at the time that were presented at a prior court proceeding.

I reviewed testimony of Dr. McClain and Dr. Larson. I saw their reports and raw data. I received some raw data and read the depositions of Dr. Taub and Dr. Krop.

I received mental health records from the Department of Corrections.

And the information I received about the crime scenario was gained from the Supreme Court opinion that I was provided.

[735] I read a transcription of Mr. Hurst's statement to Investigator NeSmith and heard an audiotape of his statement. I listened to the testimony of Dr. Taub and the witnesses that knew Mr. Hurst, and I also heard Mr. Krop's testimony.

Q. Now you talked about a couple of persons, Dr. Larson, Dr. McClain. How about a Dr. Riebsame?

A. I also reviewed his test data that was a included a Wechsler Adult Intelligence Scale, Third Edition, that was given prior to Dr. Larson's in, I believe it was, 2003. Dr. Larson's was given some months later in 2004, if I recall right. But it was during a time period before, again, some prior court proceedings.

Q. And what tests were performed by those two persons?

A. Probably the most important ones were the Wechsler Adult Intelligence Scale, Third Edition, by Dr. Larson and the test of memory malingering.

There were some other tests. I believe the Wide Range Achievement Test and another — I believe another test of memory. Dr. McClain's gave an abbreviated test called a "WASI," a Wechsler Abbreviated Scale of Intelligence. She also gave some neuropsychological tests, an M-fast, a more forensic assessment test that is a test of malingering psychiatric symptoms. These are the things that [736] I think are the most important that I'm relying on.

Q. Now, as far as — are these the materials that you've just described, materials that an expert in your

position would generally rely on in rendering any type of opinion in an examination such as this?

A. Yes.

Q. Now, what exam — did you test Mr. Hurst?

A. Yes.

Q. Now, we'll stay away from the WAIS-IV because we know we have issues with that.

A. Okay.

Q. Because in essence, if you could explain, were you aware that they had already administered the WAIS-IV at the time you administered the WAIS-IV?

A. I was not aware that it had been recently administered, although I inquired.

Q. Now as far as the — are you familiar with basically the idea and the definition of mental retardation as set forth within the State of Florida?

A. Yes.

Q. Okay. And could you — and basically there are three prongs. And if you could, just amplify on these three prongs to the folks on the jury.

A. It involves three things. First is intellectual functioning — sub-average intellectual [737] functioning; two standard deviations below the mean on a test anointed by the Department of Children and Families, such as the Stanford Benit or the Wechsler — one of the Wechsler Scales; concurrent deficits in adaptive behavior to that degree and onset prior to the age of 18 a developmental disorder.

Q. And to look at this — these three prongs of the definition, you reviewed the information that you've

talked over the course and also interviewed Mr. Hurst personally, have you not?

A. Yes. And I neglected to say that I reviewed available educational records from the Escambia County School System in regard to school records and some test results as well.

Q. Now, with respect to that, after having reviewed all of this material that you have and looked at the tests — now you also have looked at Dr. Krop's testing; have you not, sir?

A. Yes.

Q. Factoring all of that information into your examination, do you have an opinion as to whether Mr. Hurst fits the definition of mental retardation within the statute?

A. In my opinion, he does not.

Q. And if you could, could you amplify and [738] explain why you — how you reach that had opinion, sir?

A. First, there is no objective information suggesting that he was functioning at such a low level as measured by any kind of intelligence testing in the Escambia County School despite coming to the attention of exceptional student services for a language disorder. And he received help for that at around age 10 and for several years.

His speech is now indistinct because of the extraction of teeth, so it's hard for me to know for sure whether he still has some speech impediment or if it's now totally due to the loss of most of his teeth.

Also having heard the statement to Investigator NeSmith during the investigation, the speech was not as bad on the tape as it was in my interview with him.

And Mr. Hurst complained quite a bit about the extraction of teeth affecting his speech. So all of these things were considered.

Q. Now you're not saying that Mr. Hurst does not have intellectual deficiencies, are you, Doctor?

A. No. He definitely is not of average intellect.

Q. Now, as far as the adaptive behavior prong, do you see any deficiencies in reaching the idea that he fits the definition of mental retardation in that area?

A. Well, again, this was not directly assessed by [739] a test of adaptive behavior at the time by people that were living with him and knew him well in any standardized way.

We have heard anecdotes and attempts to use the test of adaptive behavior, but you're asking people to go back in time 14 years or thereabouts when the people that were — except for Mr. Hurst, were rating him and trying to recall what they thought he usually did or did not do. So there is not information to support that.

There is some information from the schools that he did, while not average, below average on his achievement tests, it was nowhere near the bottom two percent in most areas assessed in the school system. So we don't see it in achievement tests carried out by the school.

So it is my belief that he is a person that had language difficulties, may have some cognitive deficits that contribute to having stuttered as a child. I've noticed some tics in his eyebrows that could be neurological. We've heard testimony of Dr. Wu that opined that he had PET scan results that could be consistent with brain damage or brain disfunction. So he may have a degree of cognitive impairment or cognitive disorder

not otherwise specified. But I do not believe that he is mentally retarded, which would apply to a person with an I.Q. of 70 or below, and with the basically equivalent deficits and adaptive behavior that had an onset before 18.

[740] MR. MOLCHAN: I don't have any other questions.

MR. DOSS: Can I have one second, Judge?

THE COURT: I'm sorry?

MR. DOSS: Can I have one second?

THE COURT: Oh, sure.

(Pause in proceedings)

CROSS-EXAMINATION

BY MR. DOSS:

Q. Good afternoon, Dr. McClaren.

A. Good afternoon, Mr. Doss.

Q. Whenever you went to the — whenever you went to the jail and you were under the impression — I understand that you weren't under the impression that Mr. Hurst had been administered a WAIS-IV, right?

A. Yes. I did not know that, and I did inquire with him.

Q. Right. But you, in fact, were going to give him a WAIS-IV, right?

A. Yes, that was my plan.

Q. And you did, but for reasons that we've already stated, it's not valid and I understand you're not relying on it. But that was the test that you had chosen to measure his I.Q., right?

A. Yes.

[741] Q. And you chose that because that's the most accurate and up-to-date measure of measuring I.Q. whenever you're using the WAIS Series of tests, right?

A. Yes. Though I would say that it correlates very highly with the WAIS-III.

Q. But you wouldn't take a WAIS-III today and go test Mr. Hurst and present that as being the most accurate up-to-date testing of Mr. Hurst's intelligence, right?

A. I would not. But I would also keep in mind that in 2003, 2004, when it was a test to be used, that he scored a 76 and a 78 in two different administrations, and the first administration got the 76 by Dr. Riebsame. So I realize there's a track record of I.Q. scores at that level in the fairly recent past given by two different examiners, one of whom I know — or whose practice I know.

Q. Can you site to me any peer review articles that say you should rely on a WAIS-III test from eight years ago rather than a WAIS-IV test administered a month ago as being more accurate?

A. No. I can't site anything that would say that in any global sense. But I think that it would be bad practice not to consider previous testing using the state of the art instrument at the time, especially if the test memory of malingering, which was used by Dr. Larson, gave the kind of results on a test of visual recognition that [742] looks hard, but it's really not, and the person, in this case Mr. Hurst, scored at a level no better than a blind man.

Q. But the thing is, did you find anything wrong with the administration of the TOMM by Dr. Krop?

A. No.

Q. So why would a TOMM that was given eight years earlier take precedence over one that was given at the same time as the test that's in question, that's the most up-to-date accurate test?

A. Well, they are different tests. To me, realizing that the correlation is so high between the WAIS-III and WAIS-IV makes me wonder if there was other factors at work that would make it go down so much.

But keeping in mind that the score between 69 and 78 is not a wide scatter especially if you know that a renorming of the test like the WAIS-IV from the WAIS-III might give you two or three points difference for someone of borderline intellect. So these are close; all these are close.

Q. And you said you listened to the testimony. Did you listen to Calvin Harris' testimony where he had indicated that within Escambia County Schools, whenever Mr. Hurst was at Tate High School and repeated the tenth grade twice before getting put in the charter school, he [743] took that HSCT test and failed it twice. Did you hear that?

A. Yeah. In fact, I had the records of it before I heard it, yes.

Q. And did you hear whenever Mr. Harris was saying how only, only five percent of the people can't pass that test eventually?

A. That's what I recollect. I also recollect the California Achievement Test that was done earlier on

showing much better achievement than would be expected of someone of an I.Q. of 70 or below.

Q. Can you site to me any peer review articles that say that the achievement test directly correlates to the I.Q. test?

A. They don't directly. In fact, we heard testimony that maybe tend to underestimate. But the results of the couple of California Achievement Test results were, I want to say, around the 15th percentile for the most part, not around the second percentile.

Q. And do you have any reason to say that using the ABAS is not an accepted method of measuring adaptive functioning?

A. Not when it's done as intended when you're talking to someone who is around the person day-in and day-out in multiple settings that has direct knowledge. Not having to go back in time, which is a trouble that you have [744] at trying to estimate a person's adaptive behavior prior to the age of 18 if no one has really seen them in the real world for that long.

Q. The witnesses that came forward had resided with him all of his life, right? The ones that you watched and came in and testified.

A. Prior to the last 14 years.

Q. And as well as the principals that came in and testified directly as to their direct observations of his behavior. They testified to adaptive functioning deficits, did they not?

A. But not in any objective kind of way. It was anecdotal.

Q. And that whole ABAS is set up so that whenever you take that anecdotal evidence and you plug it

in, that the software scores it and comes up with a computerized data indicating where they fall on the scale. Is that not objective?

A. If it is done near about the time that the person is being assessed.

Q. I notice that you had said that Mr. Hurst may have a degree of cognitive impairment. Do you have any reason to dispute Dr. Wu's testimony in regards to the PET scan?

A. No. He said that it probably wasn't [745] definitive; it would be consistent.

Q. And you're not trained as a neuropsychologist, right?

A. No.

Q. So when Dr. Krop testifies to the neuro psych information that he had performed, you wouldn't have the expertise to necessarily contradict that not being trained in the neuropsychiatry, correct?

A. No. I would not be able to rescore his neuropsychological test. But my memory was that he gave the diagnosis only of mild mental retardation, not brain disfunction during testimony.

MR. DOSS: No other questions, Judge.

MR. MOLCHAN: No other questions, Judge.

THE WITNESS: Thank you very much.

THE COURT: May he be excused?

MR. MOLCHAN: Yes, he may.

THE COURT: Thank you, sir.

MR. MOLCHAN: Sergeant NeSmith.

(Pause in proceedings)

THE COURT: Okay. Sir, you have been previously sworn. You are still under oath.

WHEREUPON, DONALD BUDDY NESMITH, having been first duly sworn, was examined and testified as follows:

[746] DIRECT EXAMINATION

BY MR. MOLCHAN:

Q. Reintroduce yourself.

A. Donald Buddy NeSmith, Jr.

Q. Now drawing your attention to this case, did there come a time with you took a statement from Mr. Hurst?

A. Yes, I did.

Q. And where was it done — where was the statement taken?

A. The statement was taken at our sheriff's office in the interview room.

Q. Was it recorded?

A. Yes, sir.

Q. How was it recorded?

A. It was recorded on a cassette tape.

MR. MOLCHAN: If I could approach the witness, Your Honor.

THE COURT: Yes.

Q. (By Mr. Molchan) I'm showing you what's been previously marked as State's Exhibit 48, sir. Do you

recognize that? Have you had a chance to listen to that previously?

A. Yes, sir, I have. And this is initialed by me.

Q. Is it a true and accurate representation and [747] recording of the conversation that you had with the defendant?

A. Yes, sir.

Q. And what date was that?

A. May 2, 1998.

MR. MOLCHAN: Move it into evidence and we move to play it at the time, Judge.

MR. DOSS: No problem, Judge.

THE COURT: So received.

I don't know how loud the tape is, Mr. Molchan.

MR. MOLCHAN: Judge, I have transcripts.

THE COURT: Oh, okay.

MR. MOLCHAN: If you want to give them an instruction, Your Honor.

THE COURT: I didn't see it coming, so you'll have to give me a second.

MR. MOLCHAN: I'm sorry, Judge.

THE COURT: I've got it whenever you're ready.

What I was going to say, though, Mr. Molchan, is I don't know how loud that is. A lot of times you'll have to put it in front of a microphone.

MR. MOLCHAN: It's pretty loud, Judge, as I recall.

THE COURT: Okay.

[748] MR. MOLCHAN: You want me to pass out the transcripts now?

THE COURT: Yes. Members of the jury, you're about to hear recorded conversations. These recorded conversations are proper evidence and you may consider them just as any other evidence.

You are also being furnished transcripts of the recorded conversations. The recordings are the evidence and the transcripts are provided to you only as a guide to help you follow as you listen to the recordings. The transcripts are not evidence of what was actually said or who said it.

If you notice any difference between what you hear on the recordings and what you read in the transcripts, you must rely on what you hear not what you have read.

MR. MOLCHAN: May I proceed, Your Honor?

THE COURT: You may.

(Exhibit No. 48 played for the jury. The audible portions are reported as follows:)

BY MR. NESMITH:

Q. Test 1, 2, 3. Test 1, 2, 3.

This is going to be a recorded statement taken at the Escambia County Sheriff's Office in reference to a sheriff's complaint. Complaint number unknown at this time.

[749] This is Investigator Buddy NeSmith with Sergeant Tracy Yuhasz. Today's date is 5/2/97. The time that we've started here is 2:58 p.m.

Today's statement will be given by a Timothy Lee Hurst of 7870 Aaron Drive, Pensacola, Florida, 32534. Date of birth is 12/8/78. Social is 265-87-7687.

Is that information I gave correct?

A. Yes, sir.

Q. Okay. Would you state your full fame for me?

A. Timothy Lee Hurst.

Q. Okay. Tim, before we start talking about the incident, I read you a piece of paper with the rights on; is that correct?

A. Yes, sir.

Q. And then you initialed all five; is that correct?

A. Yes, sir.

Q. Is this your signature at the bottom?

A. Yes, sir.

Q. When I read this, did you understand all five statements that I read?

A. Yes, sir.

Q. And you understand that the waiver — that we didn't promise you or pressure you of any kind; is that correct?

[750] A. Yes, sir.

Q. Okay. And did you come down here to talk to us today to try to help us?

A. Yes, sir.

Q. Okay. And then we started talking about basically what you did this morning.

A. Uh-huh.

Q. Okay. If you would, let's just go over it again starting with when you woke up and just, you know, kind of walk us through it. Okay?

A. All right.

Q. All right. All right, go ahead. Any time you're ready.

A. I woke up at 7:30. I left the house at 7:45. When I was on my way to work, my car had stopped on Untreiner Street and my car stopped. I cranked it up again just enough so — to try to go to my friend's house, Andre, and I went at his house.

His mama was on the phone. I told him my car was messed up and it cut off on me. But I couldn't use the phone there because his mama was on it.

So I left there and I make — I make it up to the pay phone on, on E-Z Serve right across the street from the ballpark.

Q. Okay. Now, I don't — you know, we know who [751] your friend is, so let's tell who your friend is, okay?

A. Yes, sir.

Q. Okay. So you went to Andre's house.

A. Yes, sir.

Q. Okay. Did you use the phone at Andre's house?

A. No, sir.

Q. Okay. Did you ask to use the phone at Andre's house?

A. Yes, sir.

Q. Who did you ask to use the phone?

A. Andre.

Q. Did you ask Andre's mama or daddy?

A. No, sir.

Q. Did they see you at the house?

A. His dad did.

Q. His dad?

A. The dad came out of the house.

Q. Because we don't know Andre's address, tell me how to get to Andre's house.

A. Like it would be from my house?

Q. Yeah, yeah.

A. Just go to Untreiner. At the stop sign, take a left. At the second — the second turn on the left, that street right there, you see a school bus.

Q. Okay. And that's the house?

[752] A. That's the house.

Q. Okay. And that Andre's house?

A. Andre's.

Q. Okay. All right, go from there. From Andre's house.

A. Now, I left Andre's house, went to E-Z Serve to use the pay phone. When I called on the pay phone, Cynthia was on the phone and I told her I won't be able to come work. She said, yeah, and she hung up. So when I came from E-Z Serve, I went to Lee Lee's house.

Q. Okay. Let's slow down just a little bit, okay? The E-Z Serve is where?

A. On Detroit across — across from the ballpark.

Q. On the same street that you were driving up and down? Untreiner?

A. Uh-uh.

Q. That's not on?

A. Untreiner meet with Detroit.

Q. Okay.

A. And where they meet is at E-Z Serve right there right across from the street at E-Z Serve and the ballpark.

Q. Okay. Right there at the corner. Okay.

A. Yeah. So when I got off the phone with Cindy, I went to my boy Lee Lee's house —

[753] Q. Okay. Let's back up a little bit. You used the pay phone where?

A. At E-Z Serve.

Q. Okay. And you called who?

A. Cindy.

Q. Okay. Do you remember the number you called?

A. Uh-huh.

Q. What number did you call?

A. 478-5258.

Q. What number is that?

A. Popeye's number.

Q. Okay. So that's your business, where you work?

A. Yes, sir.

Q. And you talked to who?

A. Cindy.

Q. All right. Tell me what — tell me that conversation.

A. When I called, she got on the phone and I told her I wasn't going to make it to the job. And she — in a scary voice, she said okay. And in the background when I called, I heard some whispering in the background.

Q. Uh-huh.

A. And when she hung up, then well, well — when she's on the phone, that's all I heard. But through her [754] voice I heard a scary, you know, scary tone in her voice.

Q. Okay?

A. That's what sounded different.

Q. Explain that to me. That's hard. You know, different people, you understand?

A. Uh-huh.

Q. And different things. Explain that scary voice to me.

A. It's like, like, you know, like, like — when you're like — how can I put it? It didn't feel like — like we know something happened. That's her voice. Her voice changed like from regular voice to like, you know, like a low tone.

Q. Uh-huh.

A. She, she — her voice was wiggly. You know, like speaking in a voice.

Q. Uh-huh?

A. And she, she wasn't speaking the way, the way she, she normally speak. Because usually when she's on the phone, she say — she say her name and then Popeye's and then — and then afterward then can she help you. But when she got on the phone, she said hello. And then, and then usually when I call in about something, I usually tell me like can I find another way to come to work. But she didn't ask me no questions about how to come to work or nothing. [755] When I told her I couldn't — that I wasn't going to be able to make it, she said okay and then hung up.

Q. What'd you think about that?

A. I felt like she must have been sick, tired, or something, something, something was — had gone wrong.

Q. Okay. But it was unusual. Most of the time they ask you to come on in no matter what?

A. Yeah.

Q. And today she didn't do it?

A. Uh-huh.

Q. What did you do next?

A. After I got off the phone, I went to my friend Lee Lee's house. I wanted to see if he was (unintelligible) at 8 o'clock. When, when I went to his house, and when I left his house, we went to my house. My brother had some, had some —

Q. Now what Lee Lee's name?

A. I don't know it now. All I know is a nickname. His nickname is Lee Lee.

Q. Okay?

A. But, but I left Lee Lee's house and I went back to my house and my brother asked — my brother asked can I take you to the pawn shop —

Q. Your brother being who?

A. Jermaine Bradley.

[756] Q. Okay.

A. And I said, yeah. But I told him — but I told him, I told him I'm gonna try to get something to clean my tank — to clean my tank out.

Q. Uh-huh.

A. So we went to Lee Lee's house. Lee Lee gave me some —

Q. Where does Lee Lee live at?

A. He live on Basin Street. He got — he also got a school bus in his yard. And so we came there and I put the stuff in my car. We went back to my house. I got my brother. We went to the pawn shop.

Q. Now who, who was all with you now?

A. In the car? It was my brother, Jermaine Bradley, my friend Lee Lee, and this other boy — my brother friend. I don't know his name.

Q. Okay.

A. And we went to the pawn shop. When we left from the pawn shop, I dropped (unintelligible) back off.

Q. Okay. Which pawn shop did you go to?

A. The one across the street from Wal-Mart.

Q. Okay. What's —

A. USA.

Q. Cash USA?

A. Yeah, Cash USA.

[757] Q. What color is it? Do you remember what color the building is?

A. Like brownish gray — a grayish color.

Q. Okay.

A. I think.

Q. Is it directly across Wal-Mart?

A. Yes, sir.

Q. Okay, cause I don't —

A. It's got burglar bars on it.

Q. Okay, okay.

A. Right when we left —

Q. What happened in the pawn shop?

A. I bought my brother two necklaces.

Q. You bought your brother two necklaces?

A. Uh-huh.

Q. How much did you spend?

A. It wasn't my money; it was my brother's money.

Q. Okay.

A. My brother and my — that boy, they both had $20 each.

Q. Okay.

A. I brought them two necklaces that was $15 each.

Q. Okay.

A. That's all they got at the pawn shop. And [758] then we left the pawn shop to my brother's home —

Q. Now wait. One question. Why did you buy it? Why didn't they buy it?

A. They thought that they couldn't get it because they thought that — they thought that Lee Lee or somebody older couldn't get it because they needed somebody 18 or older to get it.

Q. Okay.

A. Because sometimes a pawn shop do that.

Q. Okay, I gotcha. I gotcha.

A. After we left the pawn shop, me and Lee Lee went straight to Escambia Arms to the see Lola Hurst, my cousin. I waited there until — until —

Q. Okay. Where does Ms. Hurst live in there? What apartment?

A. Apartment 119.

Q. Okay.

A. We waited there —

Q. What time did you get there; do you remember?

A. I'd say between like 8, 8, 8:20, estimating.

Q. Okay.

A. But — and we stayed in Escambia Arms like the whole day. We spent our — all our time at Escambia Arms.

Q. Uh-huh.

A. And so I got a call from my mom. The [759] police — the guy came to my house looking for me.

Q. Uh-huh.

A. So I told mom that, that — I was ready to leave, then go straight home. And I left Escambia Arms like at 1:00 — between 1:00 and 1:30.

Q. Okay.

A. And when I got home, I stayed straight at home.

Q. Did everybody go home? Who was, who was, who was in the car with you from Escambia Arms to your house?

A. Just Lee Lee.

Q. Where did he go? Did you drop him off or did he go to your house?

A. He went to my house.

Q. He went to your house? Was there anybody there when you got there?

A. Uh-huh.

Q. And you stayed there until —

A. Until y'all —

Q. Until — okay.

Okay. Now, one thing I forgot to ask you. When you went home, you were wearing your work clothes, right, that morning?

A. That morning, yeah. Yeah, I had on work clothes.

[760] Q. Why did you change when you went home?

A. When I — after I first came from Lee Lee's house when my brother asked me to take him to the pawn shop, I, I, I went, I went, I went and changed my clothes. The only thing I didn't change was my work pants and everything — I changed my shirt and my shoes.

Q. Is that the same pants you had on?

A. Yes, sir.

Q. How many uniforms do you all have?

A. I only got one. The one — the one shirt, the one pants. We got to buy our own shoes.

I change after I first, I first came from Lee Lee's house.

Q. Now — what now?

A. I changed my clothes right after I came from Lee Lee's house.

Q. Oh, okay, okay. Is this the first or second time you went?

A. The first, the first.

Q. The first time?

A. Yeah. When, when, when I came from Lee Lee's house — I was at Lee Lee's house at 8:00, I went home. I changed after that.

Q. Okay, okay, okay. And it's Lola Hurst?

A. Yes, sir.

[761] Q. Is an aunt?

A. No. She my cousin.

Q. Your cousin. Okay. Jermaine Bradley is a brother?

A. Yes, sir.

Q. Lee Lee is a friend?

A. Yes, sir.

Q. And he lives on what street?

A. Basin Street.

Q. Basin Street?

A. Uh-huh.

Q. You know which house it is? Is it on the left or right as we go down there?

A. On the right.

Q. On the right? How would I know if — how would I know it was his house? I mean —

A. The school bus.

Q. There's a school —

A. (Unintelligible).

Q. There's a school bus. Let me write that down. That's important. Jermaine is a coworker?

A. Andre.

Q. No, Andre is a co-worker?

A. Andre.

Q. And he also has a school bus?

[762] A. Uh-huh.

Q. Okay. That's where I got confused. Okay, all right.

Is there anything else now that we forgot about?

A. No, that'll do it. (Unintelligible).

Q. That's pretty much happened today?

A. Yes, sir.

Q. What time were you supposed to report to work this morning?

A. I start work at 8:00.

Q. Okay. Do you think you called in before 8:00 or a little after 8:00?

A. I called — I called before 8:00.

Q. Before eight?

A. Uh-huh.

Q. What time do you usually get to work if you work that —

A. Exactly 8:00.

Q. Do you get there always at 8:00?

A. Uh-huh.

Q. Who is usually there when you get there?

A. The managers. The manager.

Q. How many?

A. Just — well, sometimes, sometimes there'll be [763] just one manager. Sometimes it'll be the manager and somebody else like, like the other mens that work there, and that's all.

Q. Okay. Who — you said this one's name was Cindy?

A. Uh-huh.

Q. Who else was supposed to be there this morning?

A. In the morning? Cynthia that I know. Well, well, me — the only thing I know, just (unintelligible) at 8:00. I don't look at nobody else schedule.

Q. Oh, okay. How many times do you go in at 8:00?

A. Every morning.

Q. Every morning? So when you get there, who all's there on a routine basis?

A. Routine.

Q. Is it one, two, or three people, four people, five people?

A. Sometimes — well, usually one.

Q. Just you and somebody else, is that what you're saying?

A. Uh-huh, sometimes.

Q. Okay, so —

A. Sometime, sometime, sometime there will be [764] like two managers there.

Q. But on normal, it's you and one other person?

A. Yeah, yeah.

Q. Okay. Do you have anything, Tracy?

A. No.

Q. Okay. You — do you have anything else that maybe we forgot about?

A. (No response).

Q. Is that it?

A. Yes, sir.

Q. Okay.

We'll conclude this statement at 3:12 p.m.

(Exhibit No. 48 concluded)

MR. MOLCHAN: No other questions of Detective NeSmith.

THE COURT: Is he free to go?

Sorry, Mr. Doss. Go ahead.

MR. DOSS: Thanks, Judge.

CROSS-EXAMINATION

BY MR. DOSS:

Q. Good afternoon, Mr. NeSmith. This statement that we had heard, you had actually been interviewing Mr. Hurst before that, right?

A. Yes.

Q. You had went over the things that we had heard [765] on that statement, right?

A. Yes, sir.

Q. And this was more of a memorializing of what you had already talked about with him previously; would that be accurate?

A. That's accurate, yes.

Q. This interview was three to four hours long like total wise as far as your interview time? Not the statement, obviously.

A. Yeah. I would say that's about right.

MR. DOSS: No other questions, Judge.

MR. MOLCHAN: Nothing from me. No other questions, Judge.

THE COURT: You want to take the transcripts back up?

MR. MOLCHAN: All right.

THE COURT: Thank you, sir. You're free to go.

MR. MOLCHAN: Your Honor, at this time the State has nothing further.

THE COURT: Counsel, I need to see you up here in a moment. I do not need the court reporter.

(Bench conference held off the record)

THE COURT: All right, folks, I have heard the evidentiary portion of this trial. We need some time [766] to get the instructions on the law prepared, and so I am going to release you for today. When you come back in the morning, you will hear the arguments from Counsel; you will hear the instructions on the law from me; and then I will release you to deliberate tomorrow morning.

So we are going to start at 9:00. Again, 8:45, second floor Jury Management, and then we'll turn it over to you folks. All right, thank you. You're excused.

(Jury out)

MR. MOLCHAN: I've sent one to Mr. Doss and we sent them to you also.

THE COURT: All right. Before we start with instructions — and everyone else can be seated or be excused or whatever you choose to do — one of the things I did want to discuss is exhibits that are going to go back. I need to hear from you folks what it is you think is going to go back because I know there were a num-

ber of things that were put into evidence that were biohazard.

I have only on one occasion sent back biohazard with the understanding that the gloves went back with them, and I was — told them that they were not to touch it unless they put on gloves. I will [767] entertain not doing that; I will entertain doing that. I just need to hear from you folks.

MR. DOSS: My initial thought is, Judge, in a situation like that, I have had it where the judge just gave an instruction, if you want any evidence, ask us for it, we'll give you any of the evidence that was presented and then send it back. And if — that way if they wanted any biohazard, you could bring it out and then they could look at it again and publish it to the jury. I'm not saying it has to be that way. It's just a suggestion because the biohazard stuff is problematic.

MR. MOLCHAN: There's really only two things that I think, the sock and the pants. I don't think have any —

THE COURT: They did. The pants were what the gentleman put the gloves on to hold them up.

MR. MOLCHAN: Yeah.

MR. DOSS: When I had him pull them out, and the shoes, too, and sock.

THE COURT: Interestingly enough, I didn't see anybody put on gloves for the shoes, and I, quite frankly, don't know how much the biohazard on the pants would be because I think the testimony was that the washing — there was none. But I do know that there [768] was a mark, and I do know that he did put on the gloves.

MR. MOLCHAN: The socks — the only two things that I can — for biohazard are the utility knife and the socks. Because there was clearly a large volume of blood on the sock from the photograph. They'll have the photograph of the sock.

THE COURT: Like I said, I will entertain whatever you folks want. But I know that —

MR. MOLCHAN: I've also done it this way, Judge, where we have had the judge instruct them that if you're going to pull out any of these items, use gloves, assign one person to do that, and not everybody go — I've seen is it done that way also.

THE COURT: Well, and then my question is, do you actually want the box cutter itself to go back?

MR. MOLCHAN: I don't have a problem with that, Judge. I've sent knives back. As long as it's not a gun. When we send the guns back, we don't give them the ammo.

MR. DOSS: I think it's better for them to ask for it. I don't think there's any standard way to do it, Judge. I think probably the easier way is to just have them ask for whatever they want, but I'll defer to whatever Your Honor decides.

[769] MR. MOLCHAN: I think we've already told them, too, that they would be able to see the evidence.

THE COURT: Well, I usually make — I'm usually pretty cautious in saying, you'll be given appropriate evidence to take back because sometimes we have drugs and the like.

Quite frankly, all of this is appropriate but for the biohazard. And I did have one time a gun that had that, and we — and I did, I allowed it to go back. But I ex-

plained to them that whenever you're handling anything, that the Court has concerns it might have some sort of biohazard and that they must use gloves, you know, for their own protection and, not only for that, to protect the integrity of the exhibit. I have done it that way, and I guess that's the way I'll do it again. Okay.

MR. MOLCHAN: Fine with me.

THE CLERK: So it will go back, but you're going to give an instruction?

THE COURT: Yes.

THE CLERK: Okay.

THE COURT: All right. Next?

MR. MOLCHAN: Instructions, Judge. Basically it's the standard instructions. In talking with Mr. Doss —

[770] THE COURT: Y'all already agreed to the one through 10, all of that coming in?

MR. MOLCHAN: Yeah. We just want to put all — one through 10 in. It's just easier that way.

We talked about that one be stricken.

THE COURT: Let me ask you, for court reporter purposes, have you folks agreed to these instructions?

MR. DOSS: Yes.

MR. MOLCHAN: Yes.

THE COURT: All right. Then let me go through and I'll just make a record.

Then 7.11 is accepted, and all ten of the witness determinations are going to be included in.

The only thing that was excluded was the witness not testifying because Mr. Hurst has not done so, so that would be appropriate to eliminate.

MR. DOSS: I think you meant to say the witness testify, right, Judge?

THE COURT: Yeah.

MR. DOSS: You had said not testify, but I knew you meant testify.

THE COURT: That's what I meant. Actually I probably need to colloquy Mr. Hurst on that just to make sure that he understood.

MR. DOSS: Let me speak to him for a second.

[771] THE COURT: Okay, that's fine.

(Pause in proceedings)

MR. DOSS: Okay, Judge.

THE COURT: Mr. Hurst, please raise your right hand.

(Defendant sworn)

THE COURT: You can put your hand down, sir.

I want to start out by telling you that conversations between attorneys and their clients are privileged, so I do not want to get into the specifics. What I am going to get into is generalities.

In this proceeding, if you want to come up and take the stand, you understand that you have every right to do so?

THE DEFENDANT: Yes, ma'am.

THE COURT: Along those same lines, you also have a constitutionally protected right not to testify if you choose to do so; do you understand that?

THE DEFENDANT: Yes, ma'am.

THE COURT: And have you had an opportunity to talk to Mr. Doss about the advantages or disadvantages of testifying?

THE DEFENDANT: Yes, ma'am.

THE COURT: And were you confused in any way about that discussion?

[772] THE DEFENDANT: No, ma'am.

THE COURT: And based upon the discussion with Mr. Doss, did you make the determination that it would be better for you to exercise your right to remain silent?

THE DEFENDANT: Yes, ma'am.

THE COURT: And did you make that decision freely and voluntarily?

THE DEFENDANT: Yes, ma'am.

THE COURT: So no one forced you into making it decision?

THE DEFENDANT: No, ma'am.

THE COURT: Have you had any sort of medicine, alcohol, or any other substances that make it so that you do not understand what we're doing here?

THE DEFENDANT: No, ma'am.

THE COURT: Let the record reflect that he does appear competent to the Court.

All right. Then I will make the determination that he has intelligently, freely, and voluntarily made the decision to remain silent and, of course, will be given the right to do so.

All right. As we're going on with the instructions, the only other thing was the aggravating circumstances of financial gain, and that was [773] eliminated. And I guess that's because, one, it includes the robbery.

MR. MOLCHAN: We decided not to get academic and have to deal with the doubling.

THE COURT: Doubling, correct.

And when we get to the mitigators, there are eight separate mitigators. All right, they appear to be appropriate.

Let me look at the advisory sentence form. The first form, that would impose a death sentence or recommend a death sentence. Mr. Doss, do you have any objection to that?

MR. DOSS: No.

THE COURT: The one that would recommend a life sentence, do you have any objection to that?

MR. DOSS: No.

THE COURT: All right. How many sets of instructions are we going to send back with them, one or 12?

MR. MOLCHAN: Whatever you want, Judge.

THE COURT: They have to have at least one. It makes no difference to me. Usually I — I don't think that it's a complicated matter, but it's a very important matter. And so I believe I would like to have — well, actually you're going to have to make 13 [774] —

MR. DOSS: Fourteen.

MR. MOLCHAN: We'll make 16.

THE COURT: I'm going to need — for the jury, I'm going to need 13 so that they can read along with me and take back their own with them.

MR. MOLCHAN: That's fine with me.

THE COURT: All right.

MR. DOSS: And we'll excuse the alternate whenever you send them back, correct?

THE COURT: Yes, just before they walk out that door.

All right, then I think we're through. 8:45 for check-in; 8:45 for the courtroom open; 9:00 for proceedings to begin. Take care.

(Pause in proceedings)

THE COURT: Hold on, Patrice. I want to put one thing on the record.

Mr. Doss, as we've been going along, I've been pulling up case law as I was trying to see that perhaps arguments might come up about one thing or the other, and I did not stumble and I did not write it down, I don't believe — yes, I did — no, I didn't — I believe I did. It may have been Hodges; it may not. But anyway, there is a Florida Supreme Court case **[775]** directly on point. If it was Hodges that I wrote down, it would be 55 So.3d 515. It is actually Judge Terrell's case, which is here. But it completely addressed the issue on being able to raise mental retardation as a bar in the penalty phase, and the Supreme Court said we have repeatedly said that that would not be allowed. So my initial ruling obviously will stand, okay?

MR. DOSS: Thank you, Judge.

MR. MOLCHAN: I was there, Judge. I don't remember that.

THE COURT: Maybe it wasn't Hodges. If it wasn't Hodges, there is one because I pulled it up.

(Conclusion of proceedings held 3/8/12)

(Conclusion of Volume IV)

IN THE CIRCUIT COURT
IN AND FOR ESCAMBIA COUNTY, FLORIDA

STATE OF FLORIDA,

vs.

TIMOTHY HURST,
Defendant

CASE NO: 1998-CF-001795

RESENTENCING HEARING
TRANSCRIPT OF PROCEEDINGS

VOLUME V

* * *

[781] (Proceedings held 3/9/12)

THE COURT: All right. I see that I have a number of copies of the jury instructions on my desk. Mr. Doss, have you had — I'm directing this to you because I know that Mr. Molchan was the one that prepared them. And have you had the opportunity to go through them and review and make sure that they are accurate?

MR. DOSS: Yes, Judge.

THE COURT: I also have the forms. We went over those yesterday, but again —

MR. DOSS: They appear to be the same forms that we agreed to and the same instructions that we agreed to yesterday, Judge.

THE COURT: All right. What I intend on doing, I'm going to read the closing argument instruction that

just tells them to pay attention. I am aware that this is different than most trials because it is a death penalty case, and so there is not a rebuttal by the State. I am not going to limit you to time. You both have indicated that it will be somewhere around 45 minutes to an hour.

MR. DOSS: Or it might be a little bit more, Judge. I was looking at it as I was working through it last night. Mine might be a little bit [782] more. I don't think it will be anything excessive, but I think it will be a little bit more.

THE COURT: What I intend to do is add an hour. Just give you a notice that we're at the hour point, and that way then you'll know a little bit of how long the jury has been subject to the —

MR. DOSS: Subject to me —

THE COURT: — subject to the closings.

MR. MOLCHAN: The five-minute rule, Judge? I'm just talking about the 15 minutes —

MR. DOSS: Yeah, right.

THE COURT: All right. What I intend on doing, as well, is after Mr. Molchan goes, I am going to — I don't care whether he was 30 minutes, 45 minutes or an hour. Whatever he goes I am going to excuse them for five minutes to go back and stretch their legs, come back, and we'll start in with yours.

MR. DOSS: Oh, good. We had already been trained to think of how to smoothly switch the computer, so that helps dramatically.

THE COURT: Yeah, because if you go an hour and 15 minutes, that would have been two hours and [783] 15 minutes for them, so.

MR. DOSS: I'm all for that, Judge. I think I get more of their attention that way.

THE COURT: So I'm going to give them a chance to break, but then I will not break after Mr. Doss. I'm going to go right into the instructions. All right. Bring in the jury.

COURT SECURITY: Yes, Judge.

(Jury present)

COURT SECURITY: Jury's in the box, Your Honor.

THE COURT: Let the record so reflect. Everyone please be seated.

Both the State and the defendant have now rested their case. The attorneys now will present their final arguments. Please remember that what the attorneys say is not evidence or your instruction on the law; however, do listen closely to their arguments. They are intended to aid you in understanding the case.

Mr. Molchan.

MR. MOLCHAN: Thank you, Your Honor. Mr. Doss. Good morning, folks.

First of all, on behalf of the citizens of the State of Florida, the defense, myself, I would [784] like to thank you for your attention and your service during this long week. I think few of you realized that you would be pressed into service into something like this when you showed up on Monday morning. However, it's — we cannot accomplish what needs to be accomplished in the pursuit of justice, whichever verdict you take, without your participation. And certainly I'm sure I can speak for everyone in the court, that by the

members of the Court, we thank you for your attention during this time frame.

I'd like to apologize a little bit because I'm going to have you looking up on the — at the board here, and so it's not exactly a high — kind of a low tech courtroom with some high tech devices.

THE COURT: Mr. Molchan, if you need me to lower the lights, too, I've become fairly —

MR. MOLCHAN: Just maybe some of those.

THE COURT: I've become fairly adept at doing this over the last couple of months. Tell me because it may be the middle one, but it also may be those. This one?

MR. MOLCHAN: That's good.

THE COURT: Okay. That leaves a light for [785] you. All right.

MR. MOLCHAN: We're now in the penalty phase of the State of Florida versus Timothy Hurst. As I spoke earlier in my opening, I anticipate the Court is going to instruct you also that you are not to concern yourself with the guilt of Timothy Hurst in any way, shape or form. That has already been decided. And at this point you are going to make a decision, an advisory recommendation to Her Honor that carries great weight, and that she has to give great weight to, and so your learned advisory sentence is very important.

Now as I spoke in our opening — in my opening statement, the State has what's known as aggravating factors, and there are two primary aggravating factors that are present in this case.

The first one is that the murder, the capital felony, was committed while the defendant was engaged in the

commission of a robbery. That's an aggravating factor, and the Court is going to give you instructions and explain those at the close, also. But that's one of the aggravating factors that comes into play in this particular case.

The second is what we know as the heinous, atrocious and cruel aggravating factor, and this [786] is the second one. The definition is that this murder, in our opinion, and based upon our evaluation of the evidence, fits the definition. And the Court will, I anticipate, will explain to you that heinous means extremely wicked or shockingly evil. Atrocious — outrageously wicked or vile. Cruel meaning designed to inflict the high degree of pain with utter indifference or even enjoyment of the sufferings of others.

This crime is accompanied by additional acts that show that it was conscienceless, pitiless and was unnecessarily torturous to Cynthia Harrison on May the 2nd of 1998.

And those are the definitions of our two aggravating factors. In many ways, those of you who have been on jury duty before, we have elements of the offense. Well, in this penalty phase we're not talking about guilt or innocence. We're talking about whether we've proven these two aggravating factors that are present.

We have to prove an aggravating factor beyond a reasonable doubt. That is our burden. It's not — and the definition will be up there. It will be explained to you. It's not a mere possible doubt, speculative or imaginary doubt. [787] You should carefully consider, compare and weigh all the evidence. And if your conviction is one which is not stable or if it wavers and vacillates, then it's not proven. But if you have an abiding conviction that is such that these aggravating circum-

stances were proven beyond a reasonable doubt, then you should establish them or consider them as being proven.

It's our position that both of these aggravating factors were proven beyond any reasonable doubt.

Talk about the heinous, atrocious and cruel a little bit, because, in essence, the proof lies in the four-foot, eight-and-a-half-inch tall, 86 pounds of Ms. Cynthia Harrison. Now as you recall, there were multiple incised wounds, cutting, stabbing wounds to her whole body. The most particular ones are the partially transected trachea that Dr. Berklund talked about, the transected left internal jugular vein, multiple incised wounds. If you recall the pictures, and I'm not going to show a lot of the pictures again. They speak for themselves, and they speak — and you'll have them to take back. To the front, to the back, the cut to her arm. Savage. Brutal. [788] Over 60.

Cynthia Harrison's body, her 86-pound body suffered a minimum of 16 incised slashing or stabbing wounds that Dr. Berklund testified that none of those would be immediately fatal. None of those four serious wounds would be immediately fatal. Cynthia Harrison was living while those second slices went through or across her chest, went across her face, in the back of her head. What purpose does taking a box cutter and taking it to the back of a person's scalp have, other than torturing and causing pain? What other intent can there be?

We know she was bleeding because Dr. Berklund indicated there were only two wounds that he found that were at or time — at or near the time of her death. We know that her body was spurting out the blood, as Dr. Berklund described the arterial spurting, and you

saw it in the photos that they splashed as her life is leaving her body and splashing against the walls of that freezer.

I'm going to suggest to you that at some point during this ordeal, during this torture, that Cynthia Harrison was on her knees, because as you saw the photos, there were two Dr. Berklund [789] talked about blood spots, which would be consistent of kneeing in her own blood. So at some point in time during this attack she was there kneeling.

The defendant, Mr. Hurst, chose the weapon and the manner in which Cynthia Harrison was killed. A man his size and strength was fully capable of ending her life without the need for inflicting 60 wounds. But the defendant, who is charged, is guilty of that offense, chose the manner in which he wanted to end her life. And basically the box cutter that is recovered, that still had the knife open which had whose DNA? Cynthia Harrison's on it, was the instrumentality that ultimately added to her death. Heinous, atrocious and cruel.

You'll have the photographs to take back, but I suggest to you that heinous, atrocious and cruel could be shown side by side with the wounds suffered by Cynthia Harrison, and that would be the definition of heinous, atrocious and cruel. The back, the front, the back of the head, the front of the face. But you see there is also more. There is additional aspects of this murder. Her mouth, her hands are bound with electrical [790] tape. She is of no — first of all, she's of no threat physically to Mr. Hurst. But her hands are bound, her face and mouth is covered. She was not a threat to prevent the defendant from escaping with the money. She endures pain and torture. Remember what Dr. Berklund said also. While that face was cov-

ered with electrical tape there were still wounds, because the electrical tape was cut. So while Ms. Harrison is bound and gagged, Mr. Hurst is slicing her face, slicing her throat and leaving her for dead, and throwing her, basically, in a freezer where she would die.

I ask the question why? If robbery is the sole motive in this situation, why is there a need to inflict 60 wounds such as this? Heinous, atrocious and cruel. Taped and bound. Taped and bound.

Now additionally, it's a crime of greed, folks. The evidence in question here shows that Cynthia Harrison was the person responsible for the money. She had the combination to the safe. Mr. Hurst did not. Mr. Hurst did not have the combination to the safe. We know, beyond any reasonable doubt, the deposit slip was $1,751 was located and found there, and that safe was opened. [791] Cynthia Harrison held the key to that safe in her head and Mr. Hurst got it out.

Now we know what the deposit ticket means. It means that there was $1,751 inside that safe for deposit and there is $375 in change, and none of that is there. A robbery. In this case, though, greed. Greed. Simple greed for basically $2,000, combines with the torture, because as you recall, Dr. Berklund talked about numerous poking wounds where basically the side of that box cutter knife went plunging in as far as it could go, about three quarters of an inch, into her body, and there were those strange little poking holes.

I submit to you that the logical conclusion is that Ms. Harrison didn't want to give up the money or was trying to reason with him, and Mr. Hurst's idea was to poke her along. And it continued and it escalated and it escalated. It escalated from poking to slicing to torture.

Heinous, atrocious and cruel. There is no reasonable doubt there that this was heinous, atrocious and cruel. There is no question that was done in the course of the commission of a robbery, because where did the money end up? Who was using the money? Mr. Hurst.

[792] Now in this particular proceeding there is mitigation. The Court will instruct you and it basically is anything. And I don't have an opportunity to talk to you after Mr. Doss gives his closing, so I need to talk about a few things regarding mitigation. And I would say you need to pay close attention to that because, in essence, a human being's life weighs in the balance, and it should be carefully considered and looked at. A mitigating circumstance really is anything. It can be anything that you find appropriate to mitigate or what you believe is mitigating, weighing that. It only has to be proven by the greater weight of the evidence in this situation, and that's the process. And again, the Court will explain that to you, but I wanted to kind of explain how you are going to go through and what you're going to be seeing.

But the process you are going to have to go through — and again, this will be explained, is you will go through and you look at the aggravating factors. And you have to determine first, in weighing those, after weighing those aggravating and mitigating circumstances, if you believe that, one, aggravating circumstance is [793] found to exist. And basically, the mitigating does not outweigh the aggravating, or the aggravating factors alone are sufficient, you may recommend the sentence of death. The aspect of it is, you're also going to look at the mitigating. You will be instructed on both of these. You will look at the mitigating. If you find that there is no aggravating circumstances, then we're finished. Your recommendation is

life. However, if you — you'll go into that weighing possibility, because you are going to sit there and weigh the aggravating and the mitigating, and then provide the Judge with an advisory sentence in that regard.

Now it's not, you know, I've got two, he's got four, or I've got three, he's got — it's not a numerical thing. It's not a simple thing, and you are not going to be instructed in that way. Your individual verdict and analysis will decide what weight is to be given in any factor in this situation. But I will submit to you that the aggravating circumstances in this case are established beyond any reasonable doubt, and they are there, and they are there for your consideration. You will weigh the aggravation and [794] the mitigation.

I suggest to you that the mitigation in this case pales in comparison to the aggravation. The defense is focused on the limited intellectual capabilities of the defendant, and I don't think — we certainly, from the State's standpoint, are not going to sit here and state that Mr. Hurst doesn't have some type of intellectual deficiencies. But you know what Mr. Hurst has? Mr. Hurst has a killer's intellect, and he showed a killer's intellect on May 2 of 1988.

I'd like to point out a couple of things as far as the mitigation. Unfortunately, Mr. Hurst is not alone out there as far as having somebody of that intellectual capacity. And if you remember, I think it was the assistant principal that I asked the question, how many folks like Mr. Hurst — I hadn't even finished the question, and the principal says a lot of them. Mr. Hurst had a job. He carried out his duties. He had a driver's license. I suggest to you that while he has a limited in-

tellectual capability, actions and deeds speak louder than words in this situation.

I want to first talk a little bit about the [795] statement that he gave. His statement to law enforcement, which you heard clearly, is in contrast to the picture painted by his family. His speech was clear and coherent. There was no stuttering. There was no lack of understanding. He gave directions. He gave street names. He gave the phone number to Poppeye's. All in that — the tape is important. The tape clearly shows a different individual. There was no problem with his speech. There was no problem in his comprehension. But instead he gave a statement to law enforcement to avoid detention and arrest.

Now furthermore, the mitigation in this case — or with respect to the limited intellectual capacity of Mr. Hurst, let's look at the crime. The crime still shows a killer's intellect. The clean-up in the refrigerator, remember the water there. It had been mopped. Who did that? Timothy Hurst. Who had somebody wash the pants that had blood on them? Timothy Hurst. Who took the money to another's house? Not his own, not to his house. Where does he hide it away? Timothy Hurst. Who discards the victim's belongings in a garbage can? Timothy [796] Hurst. Who discards and buys new shoes in the garbage? Timothy Hurst. He may not measure up high on the intelligent quotient, but he marks up, he is way up there in the killer intellect.

Do you remember his story, his statement to law enforcement?

(Audio tape recording. The audible portions are reported as follows:

MALE VOICE: I woke up 7:30. I left the house at 7:45. When I on — on my way to work my car had stopped on (inaudible) street, and then I called the pay phone (audible) phone, I told them I couldn't come to work. She said yeah, and she hung up.

(Conclusion of the playing of the tape)

MR. MOLCHAN: He understands enough to place himself away from the crime scene, and he further goes on.

(Further playing of the tape:

MALE VOICE: She got on the phone and I told her that I won't be able to make it to the job in Escambia, Florida. She said then okay. But in the background when — when I called I heard some whispering in the background.

(Conclusion of the playing of the tape)

[797] MR. MOLCHAN: Now is he limited intellectually on May 2nd? That should be 1998. He understood enough to know he was in trouble and fabricated this story. Again, it should be '98. It does not support the contention that his intellectual limitations are significant. The mitigation in this fails way short and does not compare to the aggravation.

Now there will be a couple of other things that I think Mr. Doss will talk about, and they'll probably come together under the theme of under the domination of Lee-Lee Smith, or that he was a co-defendant with a minor participation, and that Lee-Lee Smith was the major person.

Folks, look at the evidence. That's a mitigating factor that Mr. Doss may speak of. I suggest to you that there is no evidence, there is only conjecture regarding

those mitigating factors, because the statement of the defendant — the defendant, in this statement, doesn't say, well, I was forced to do this by Lee-Lee Smith. I was made to do this, or Lee-Lee Smith and I were doing this together. That's not what he said. That's not what he said on May the 2nd of 1998. He was not under anybody's, especially a [798] 15-year-old's, domination or control.

The bottom line, folks, is there are aggravating factors. Robbery and heinous, atrocious and cruel. Mr. Hurst is responsible for both.

You'll be given an advisory sentence. The Judge will give you instructions. You'll weigh the aggravating factors against the mitigating factors, and that's something for your own personal review, and that's how you do that, and the Court will instruct you with that. But I suggest to you that there is only one place to go here, because Mr. Hurst, with his intellect, snuffed out the life of Cynthia Harrison in a heinous, atrocious and cruel manner for $2,000. And I'll ask that you return an advisory sentence recommending that Mr. Hurst receive the death penalty. Thank you.

THE COURT: All right. Members of the jury, we're going to have to swap out the video so I'm going to excuse you for just about five minutes, and then come back in and we'll start back with Mr. Doss.

(Jury out)

(Recess)

[799] THE COURT: Do you want the lights lowered like I had for —

MR. DOSS: I think so, Judge. They seem to work pretty well.

(Pause)

THE COURT: All right. Are you ready? Bring in the jury.

(Jury present)

COURT SECURITY: Jury's in the box, Your Honor.

THE COURT: Let the record so reflect. Everyone please be seated. Mr. Doss, let me get the lights. And with that, sir, you may begin whenever you are ready.

MR. DOSS: Thank you, Judge. I agree with Mr. Molchan in thanking you for your attention. I know every time I looked over everybody was paying attention and looking and listening to what testimony was coming forth, which is so important for both sides because of the decision that has to be made today, the decision that you're going to be called upon to make.

One of the first things that I think I need to speak about is, is what exactly is a life sentence? It's life without parole. We've been [800] saying life, but it's life without parole. The question you have today is life without parole or a death sentence. Either way, Mr. Hurst stays there. Either way, the only way he comes out is once he dies. Life without parole or death. That's what we have to decide today.

To properly consider this case, the Judge is going to tell you, you weigh these aggravating factors that Mr. Molchan has spoken about. That you weigh the mitigating circumstances that are going to be presented, that have been presented, that I'm going to summarize for you. What I say is not evidence. What Mr. Molchan says is not evidence. That evidence came from the witness stand. We just suggest ways to think about that evidence and ways to weigh that evidence. Obvi-

ously, you are the jurors. You are the fact finders. You can think about it any way you wish just as long as it comports with the law that gives you the guidelines for making that decision. The thing is, is that sometimes the way we look at a case might not be the way you look at the case. That's why when we talk about mitigating circumstances, it's anything that weighs in the favor of giving a life sentence. Something that [801] might be important to you that weighs towards giving a life sentence might be just that, important to you. But it's important in this case because it's something for you to give consideration and decide is it more likely than not that that's present here.

Let's think about what we have. What we have is, is we have Timothy Hurst, and you've heard a lot of testimony about the person that he is, the person that he was on that day in 1998. That he's mentally retarded. He's brain damaged. Dr. Wu said his brain pattern was consistent with fetal alcohol syndrome. We know Bertha Bradley came in and said that she drank every day that she was pregnant with Tim when she was 15 years old.

Mr. Molchan was right in that one of the mitigators to consider is whether Mr. Hurst was the major participant here or whether he was an accomplice with a minor role. I'm going to talk about some of the facts of the case. When I talk about the facts of the case, I'm not talking about guilt or innocence. That's already been decided. But I'm talking about what role is there. What weight do we give that mitigating circumstance? So when I'm talking about that, don't think I'm [802] talking about guilt and innocent. I'm talking about what role was Mr. Hurst having in this, okay? Whenever we start considering that, we also have to consider

who he is and how his — he was able to perceive the situation.

We heard from his family. We heard some heartfelt testimony from his mom that aired out basically the family dirty laundry. We already spoke about what she had said about her pregnancy with him. We also learned that DCF had taken him away for a time, and then put him back with her. But at the same time you know she loved him. That was obvious. But the thing is, is that Tim never, never recovered from this tragic start to his life, and you can see that as you see him progress and as we were able to lay out the different things in his life as it progressed. You heard a lot of testimony about his ability to read, about his ability to care for himself. Could he get from this point to that point if he didn't know where he was going? Could he wash his clothes? Could he cook? That was there to establish adaptive functioning. That wasn't to insult your intelligence and say, well, this man can't cook so don't kill him. That would be a ridiculous [803] argument. That would really cheapen the argument and cheapen the process. What it is, is it fits in because what we presented was we presented the practical. We presented the real. We presented that, and we presented the theoretical regarding intelligence. We presented the pictures of his brain. We presented the neuro psychological testimony. We had the theoretical and we had the practical so that we could put those together and make a proper application to the law in this case so that you could see who Tim Hurst was as you consider these mitigating circumstances that we presented to you. So don't think that those were simply some kind of cheap argument. What it is, is it's to allow you to see who Timothy Hurst is so you can make that decision of what are you going to do. Are you going to come back

and are you going to vote for life, life without parole, or are you going to vote for death? That's the question.

As we start to consider these mitigating circumstances that were presented to you, we talked about IQ scores. We talked about testing. We talked about theory. We talked about intelligence theory. We talked about intelligence [804] more than you probably ever thought or wanted to know. But the reason we did is because it's so important when we're deciding was he, in fact, mentally retarded. Because the doctors told you part of that definition is, was he two standard deviations below the mean of 100. Was he below that 70 that they were speaking about? And we know — we know from the testimony that he was a 69. We know from that. We also heard, as far as the definition of whether he's actually mentally retarded is, does he have these adaptive functioning deficits, as well? The adaptive functioning simply refers to the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his age, of his cultural group, of his community? That's why we had the family testify how he was growing up, how he was developmentally. What he was able to do; what he was able to not do; what he was prevented from doing because he just couldn't, even though everybody said he tried hard. We had principals that came in. Principals from Tate High School, a principal from Escambia Charter School that came down and were very matter of fact and [805] straightforward in their testimony to you as to who he was and what he was about and what he could do, and that he slipped through the cracks, because Bertha Bradley said they asked me about putting him in special education and I told them no. The principal said he slipped through the cracks.

We learned about cognitive deficits. We've learned about PET scans. We learned about brain damage. We learned about brain function. Why was that? It wasn't just to educate you about that. It was so that you'd be able to understand that there was brain damage. There is scientific proof that there's brain damage. It's not something that was conjured up. That is absolutely present. Absolutely present. Dr. Krop had found the neuropsychological indications from his testing to make the referral that you needed something more, that there was enough there to go forward. And we went forward, and that's what we ended up with. That's what you listened so intently to whenever Dr. Wu came in and testified.

Dr. Wu explained that brain damage that he saw, that there was frontal lobe damage. So what proof do we have though of mental retardation? **[806]** What proof do we have that it meets that definition of mental retardation? We've got that IQ score. You heard that IQ score. It's a 69. And Dr. Krop came up and testified and told you that it was a 69. Is there any indication that that 69 was not a valid score? No, there is not. Dr. Krop properly administered that test. Dr. Krop properly scored that test. There was no testimony that that was not a valid test, that that was not an accurate test, that that was not a reflexion of what he scored on the day that Dr. Krop gave it to him.

Confirmed by Dr. Taub and never disputed by Dr. McClaren, each doctor acknowledged that's two standard deviations below the means, that it meets that cut-off for mental retardation. But, you know, the thing is, is we didn't just present to you the IQ score. We followed up with the achievement test that Dr. Taub gave him, and Dr. Taub explained to you how that was an indicator that those were accurate scores, that it cor-

roborated that. It was consistent with what had been found in that IQ score. It signifies that he's significantly sub average in his intellectual functioning. Those are buzz words [807] for the mental retardation.

Was there an attempt to refute the IQ scores? Dr. McClaren, he said, well, I'd rely more on the WAIS-III. Come on. What did he show up? What did he show up to test Timothy Hurst? A WAIS score. The most accurate, up-to-date, technologically advanced intelligence test that's out there. There was no disputing that. Dr. Taub testified to it. Dr. Krop testified to it. Indirectly, Dr. McClaren did when he answered my question: What did you take to test Tim Hurst with? A WAIS score.

You know, the thing is, is that that 69 clearly meets the standard. Is it more likely than not? It's established way beyond that. So then the next step is, is that we turn and we look. Once the IQ has been established, we turn and we look and we say have those adaptive functioning skills been established? Is more likely than not, then they don't meet the standard of personal independence and social responsibility expected of a person Mr. Hurst's age, cultural group, community. Dr. Krop testified that he used yet another scientific instrument within the psychological community that's accepted. It's [808] accepted as such. There was never any indication that that abyss was not accepted as a standard of practice, and so he took the information. He took the information that we presented up here from the witness stand, from family, from school administrators, school records, correctional records. All that information to come in so that he could input it appropriately, as far as this assessment system he called an abyss.

What did he tell us? That Tim Hurst was measured as being deficient in his adaptive functioning skills to the point that he met the definition of mental retardation. He inputted it and the software gave him the numbers. It's not as if he went and calculated it himself. It's independent and standardized. Dr. Taub told us what standardized meant, is that you give it the same weight every time. Same questions, same method, same scoring system so that you have consistency across the spectrum so you can see where someone truly falls.

Where did Mr. Hurst fall? He fell within the range that indicated that he was, in fact, mentally retarded. Is there a question that it began before 18? Surely not. Surely not. Fetal [809] alcohol syndrome. He was delayed. Parents said he was delayed. His sister Tina past him up, that was over a year younger than him, walking before him and talking before him. The school records indicated that he was in speech, that he was, in fact, in speech.

Regardless of what the statement — that statement. You listened to it. That little antidotal piece does not trump all of what has been presented to you. Think about the questions I asked Buddy Nesmith. How long in interview? Three or four hours. How long did you listen to that tape? Eighteen minutes. It's because they had went over the information before. What did Dr. Taub tell you about mentally retarded people? They can learn. It's repetition. It had been gone over. Think about the questions that were asked. Most of them were yes, sir; no, sir. What did Mr. Sheppard tell you about the bible study? That Tim would just answer yes or no. That you could have a conversation, but you had to draw things out of him. If you listen to that statement, clearly, Buddy Nesmith was drawing things

out of him. He had been over it and he drew things out of him. So can that trump all of [810] what we presented? Is it more likely than not that Mr. Hurst is mentally retarded? It's been proven way beyond more likely than not. I submit to you that that is a mitigating circumstance. That's a powerful mitigating circumstance.

We talked in jury selection about culpability and responsibility. I gave a rather simplistic analogy about my children. Would I hold my ten-year-old at the same responsibility level as my 24-year-old? Not that I would let them not be punished, but what is the accountability level? What is the culpability level? And that's why all of this information is so important to you, is because what standard do we hold someone in Mr. Hurst's position as opposed to someone that doesn't suffer from those intellectual disabilities that he suffers from that have been clearly established? Mr. Chislom came up and said Tim was a follower, that he looked up to Lee-Lee Smith. Mr. Harrison — he was a follower. His brother Jermain said Lee-Lee was the leader in that relationship not Tim.

The interesting thing, whenever you consider this and you start going through it, is that the testimony that was presented up here from the [811] family and the testimony that was presented from the doctors, the testimony that was presented from the individuals that saw him on that day that we put up there, as we called Patrick Wallace, as we called Andre Cary, as we called Aldwin Dees, his mom, his brother, his sisters, his dad, it went uncontroverted. That means it's more likely than not. There is strong mitigation. It's something that's deserving of great weight.

Let's think about the brain damage. That's strong mitigation that should be given great weight. Dr. Wu

told us he has frontal lobe damage. What is it about frontal lobe damage that's important? What is it about that? It controls impulsivity, judgment, immaturity, risk taking, rule breaking, inability to modify, and inhibit behavior appropriately. Did the brain damage fit the pattern for fetal alcohol syndrome? That's something you have no control over. You have no control over whether you're brain damaged or not. You have no control over whether your mom drinks every day while she's pregnant with you. You have no control over that. That's just the cards that you were dealt. That's when it's such strong mitigation because of the way it affects [812] the behavior, because it's not something that's chosen. Nobody chooses to be mentally retarded. Nobody chooses to have fetal alcohol syndrome. Nobody chooses to have brain damage. Are there other people out there? Yes. How many people are out there that have all of them? And they are not in here. Mr. Hurst is in here. He's the one on trial here. He's the one that we're considering not anybody else. We haven't heard about anybody's life other than Mr. Hurst that you're going to sentence, that you are making a considering of life without parole or death.

Now it's interesting to look at some of the facts of the case. And again, I'm not talking about guilt or innocence, but I'm talking about does this establish that Tim was a major participant or does it establish that he's an accomplice? And when we start thinking about it, listen and think about the testimony that came from the stand. Tim woke up. His mom woke him up at 7:40. Dad leaves at 7:45. He's out there taking the battery that was on the charger and putting it in this car. We know from Dr. Berklund that he said he didn't have to go and try to figure out a time of death because the window was [813] 7:55 to 8:05 or 8:15, right in that

range, right? Well, Tim left his house, heard from Andre Cary, came to Andre Carrie's house to use the phone. You heard Tim talk about it in his statement. Andre Cary never saw any blood on him. Andre Cary said he had car problems. Tim's wanting to call in and tell them he's late. Says he calls. You hear it in his statement. Says he, in fact, calls, and that there is some whispering.

No blood on him. You saw the pictures of the scene. They are horrible. You heard the testimony of Dr. Berklund. You heard the State talking about it, as far as you have this arterial spurting. Can somebody go do that, and then show up at somebody's house in their same uniform and not have blood all over him? Can a mentally retarded, brain damaged individual get there and commit this heinous crime and get back with no blood, in that time, if he's not an accomplice with a minor level of participation? Tremendous mitigation. Tremendous mitigation.

How could those pants that you saw not be covered in blood? How could the shoes that are purportedly his not be covered in blood if he's the major participant? How could those socks that [814] have DNA of Cynthia Harrison be the ones that he wore if there is no blood inside the shoes that are supposed to be his? Where is that transfer? Because he's not the major participant.

Tremendous mitigation because that mitigation cuts both ways. The horrible crime that Mr. Molchan described of the major participant, how much weight do you give to the minor participant? It cuts two ways. It lessens the weight to the hack, increases the weight of the mitigation. That's the weighing process. That's what we have to do whenever we weigh and we sift this back and forth.

How can someone that was the major participant in that bloody crime scene come out of there and not have blood on the steering wheel? The steering wheel cover had no blood. I asked the question, that was the answer. The brake pedal had no blood. That was the question. The car had no blood. We heard where Tim went, each and every step. Aldwin Dees stuck the phone out, let him use the phone, took the phone back. Said he didn't really see him. Comes home. Jermain and Marcus are there. Jermain said I didn't see no blood. Goes to Walmart. Goes to the pawnshop. [815] Goes to Escambia Arms. That's what he talks about in his statement, and that's what's presented.

Now let's think about Lee-Lee Smith, the man that couldn't give consistent testimony, the man that was impeached over and over again with inconsistent testimony. That's one of the ways that we weigh whether to believe someone or not. The Judge is going to read it to you. Inconsistent testimony is an indication that they are not credible, they are not believable. It wasn't just one time he was inconsistent. It wasn't just two times. It was repeatedly over and over again that I walked up and showed him the statement and he had testified differently at different times. Multiple times on critical facts.

What about these pants that were supposedly washed that are filthy? Before he says, well, I had washed them. The dryer was broken and he ironed them dry. What did he tell us today — or a couple days ago? Threw them in the dryer. If you look at these white shoes that are supposed to be Tim's, look at the bottom of the pants. They've got the black scuff marks with the black Reeboks that were testified about. Why is this [816] important? It's important because it estab-

lishes the mitigation that he was not the major participant. He was the minor participant.

Is there a reasonable doubt as to the hack? That goes to a reasonable doubt to the hack of whether he was the one in there doing those horrible things. The Judge is going to list out several mitigating circumstances that are defined within the law. I'm going to bring to mind a few of them for you so that you can start processing them in your mind, start weighing in your mind are these established. If they are established, how much weight should be given them? Just like you have to do with the aggravating circumstance. Were they proven beyond a reasonable doubt? If so, what weight do I give to it? Is it more likely than not that these mitigating circumstances exist? And how much weight do I give to them? And when I combine all of them up, do they outweigh what's over here in aggravation? That's what you're going to have to do.

One of the ones that I want you to look at is his ability to conform his conduct to law was substantially impaired due to low mental functioning. He's got mental retardation. He's [817] got brain damage. Is it more likely than not that that was the case? The brain damage. Impulsive. Has a problem with inhibition. Has a — we know he's a follower. The testimony was up there. Principals that knew him several years ago came in here and told you yeah, I remember him. He was a follower. He looked up to Lee-Lee.

There is an age mitigator out there, as far as being a very young age. He was 19. But I want you to take it a step further. A step further and think about the questions that were asked of what was his maturity level. Where did he function at? We were talking to principals that see thousands of kids. Men that have

been in education for 20 plus years. They've got a good frame of reference of what a child is suppose to act like, and they said he was like a middle school kid. That he functioned like a 12-year-old. The age mitigator absolutely applies. It's absolutely more likely than not.

Another one is whether there was any criminal history. Does he have any criminal history prior to what we're here for? No, you heard nothing. No criminal history was brought forth. There is none. It's surely more likely than not. The [818] question is what weight do you give it? Then one of the ones that I submit is a little bit harder, a little bit more complex, is the one that we were touching upon as far as whether he was an accomplice and his role was relatively minor. The funny thing is, is that the only person, the only person that really puts Tim at the Poppeye's that morning is Carl Hess.

What did we learn about Carl Hess? What we learned about Carl Hess is, is that Carl Hess gave several inconsistent statements. Admitted giving information that wasn't true that he was an assistant manager. Admitted giving information that was misleading as being a manager trainee, because he had flunked out of the program. If you remember when I asked him, he said he had no authority to interview anybody. Why is that important? Because the idea that was shown you, supposedly his ability to make that identification, was predicated upon an interview with Tim Hurst. An interview that he never did, because he didn't have authority to do it. He said he spoke to him after, a couple days after. After it had been in the paper. After he had already seen what was in the paper. Afterwards, [819] so that he could come forward and he could be the hero. That's when it matters. That's when it's important. One hundred seventy-five feet away he's sup-

pose to be able to identify someone when he hadn't even been truthful about his ability to make that kind of identification.

Something else that is interesting whenever you look at that, is it conflicts with Mr. Kladitis. That's another way to gauge somebody's credibility. Because when I asked Mr. Hess, Mr. Hess said, no, I didn't see anybody else, except for that truck driver. Mr. Kladitis was there. He came in there at 7:15 to 7:20. Mr. Hess said he was out there at 7:15, 7:20. Mr. Kladitis is there eating breakfast with his daughter, waiting for the Barnes feed store to open up. He says two carloads come in of young black men playing their music loud. Loud enough that it bothered him enough that he moved. Mr. Hess never says nothing about that. That loud music, he couldn't hear that loud music. He didn't see them fellows.

The State called Anthony Brown, who said he shows up 8:05, 8:15, right? Mr. Hess never testifies about him, and Anthony Brown is telling [820] you I'm banging on the door. I'm beating on the door. Truck driver comes up. They are still trying to get in. That he sat there for a couple of hours. Mr. Hess never says anything about seeing him. It all goes to his credibility. He can't be believed. There is a reason to doubt his credibility. Multiple reasons to doubt that credibility.

You know when we continue to look at Lee-Lee Smith's credibility. That's why Andre and Patrick Wallace are also important, as it goes to looking at Lee-Lee Smith. He said they supposedly got some money from the Poppeye's. They supposedly got part of the proceeds. Both of them said no, never gave me no money. 'Cause Lee-Lee's making it up. Lee-Lee's inconsistent and making it up. He's not worthy of belief. He's not

worthy of any credibility. The things that he says about Tim are not worthy of being believed because he's inconsistent. It's inconsistent with what he said. It's inconsistent with what other people said.

All of this weighs as far as was Mr. Hurst an accomplice with a minor role or was he a major participant? What's the weight to give that hack? [821] All those horrible things that you see that happened to Ms. Harrison, what's the weight to give to the minor participant?

How do you take these and combine them together? What weight do you give them when you combine each one of these factors? Each one of these mitigating circumstances, as you put that on the scale? Each one of them. All of them that I spoke to you about, as you take them and you put them on the scale, that you have that scale out there. You have the hack and the robbery that Mr. Molchan spoke about. You have the mitigating circumstances that we've been talking about. No prior history of criminal activity. He's the accomplice. He's not the major participant. His ability to conform his conduct to the law is substantially impaired.

Extreme emotional disturbance from the brain damage, and the inability of the frontal lobe to control behavior. Being impulsive. Being immature. Of not being able to function like that normal brain up there would have him to. It's clear. It's clear. His young age, another one on the mitigation scale. Immature. Acts like a 12-year-old. Follower, not a leader.

[822] Then you know what? That mitigation side, that mitigation scale is still waiting for any other thing that you think mitigates in the weighing process. Anything else that weighs towards giving Mr. Hurst life

instead of death goes on that scale. Not just the ones that I've talked about, but the ones that is as you sit there and you intently listened day after day that struck you to say I don't know that I can vote for death because of that. Those go on that scale too not just what I say. Not just what we put up there as far as what I'm arguing now. Is there something else up there that should go on the mitigation scale? It's a question only you can answer. What is it in Mr. Hurst's background, character or life that tend to mitigate against giving him a sentence of death so that the State ends his life? That's what you have to think about. Or what is it that you've heard that Tim Hurst — that compels you to consider it for life, that you vote that he lives and not die? That he spends the rest of his life in prison either way.

But the question is, do you vote for the State, to end his life, or do you vote for him to live? You have mitigation weighing. You have [823] aggravation weighing.

Can we hold Tim Hurst, a mentally retarded, brain-damaged man, fetal alcohol syndrome, follower, no criminal history; can we hold him responsible enough to the point of voting for him to be executed? Or does it compel a vote for life? The answer is a resounding life. When you go back there and consider it, I encourage you, implore you to vote for life. To come back with that recommendation that he live. Thank you.

THE COURT: Security, if I can see you for a moment. Members of the jury, I am about to read the final instructions to you. Each of you is being given your own copy. I direct that you read along with me so that we literally are on the same page, and you will be al-

lowed to take these with you when you retire to deliberate.

It is now your duty to advise the Court as to the punishment that should be imposed upon the defendant for the crime of first degree murder. You must follow the law that will now be given to you and render an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty or whether [824] sufficient mitigating circumstances exist that outweigh any aggravating circumstances found to exist. The definition of aggravating and mitigating circumstances will be given to you in a few moments. As you have been told, the final decision as to which punishment shall be imposed is the responsibility of the judge. In this case, as the trial judge, that responsibility will fall on me. However, the law requires you to render an advisory sentence as to which punishment should be imposed — life imprisonment without the possibility of parole or the death penalty.

Although the recommendation of the jury as to the penalty is advisory in nature and is not binding, the jury recommendation must be given great weight and deference by the Court in determining which punishment to impose.

Your advisory sentence should be based upon the evidence of aggravating and mitigating circumstances that has been presented to you in these proceedings. It is up to you to decide which evidence is reliable. You should use your common sense in deciding which is the best evidence, and which evidence should not be relied upon in considering your verdict. You may find [825] some of the evidence not reliable, or less reliable than other evidence.

You should consider how the witnesses acted, as well as what they said. Some things you should consider are:

1. Did the witness seem to have an opportunity to see and know the things about which the witness testified?

2. Did the witness seem to have an accurate memory?

3. Was the witness honest and straightforward in answering attorneys' questions?

4. Did the witness have some interest in how the case should be decided?

5. Did the witness's testimony agree with the other testimony and other evidence in the case?

6. Had the witness been offered or received any money, preferred treatment or other benefit in order to get the witness to testify?

7. Had any pressure or threat been used against the witness that affected the truth of the witness's testimony?

8. Did the witness at some other time make a statement that is inconsistent with the testimony [826] he or she gave in court?

9. Was it proved that the witness had been convicted of a felony or a crime involving dishonesty?

10. Was it proved that the general reputation of the witness for telling the truth and being honest was bad?

You may rely upon your own conclusions about a witness. A juror may believe or disbelieve all or any part of the evidence or the testimony of any witness.

Expert witnesses are like other witnesses with one exception. The law permits an expert witness to give an opinion. However, an expert's opinion is only reliable when given on a subject about which you believe that person to be an expert. Like other witnesses, you may believe or disbelieve all or any part of an expert's testimony.

A defendant in a criminal case has a constitutional right not to testify at any stage of the proceedings. You must not draw any inference from the fact that a defendant does not testify.

These are some general rules that apply to [827] your discussion. You must follow these rules in order to return a lawful recommendation.

1. You must follow the law as it is spelled — excuse me. As it is set out in these instructions. If you fail to follow the law, your recommendation will be a miscarriage of justice. There is no reason for failing to follow the law in this case. All of us are depending upon you to make a wise and legal decision in this matter.

2. Your recommendation must be decided only upon the evidence that you have heard from the testimony of the witnesses and have seen in the form of exhibits in evidence, and these instructions.

3. Your recommendation must not be based upon the fact that you feel sorry for anyone or are angry at anyone.

4. Remember, the lawyers are not on trial. Your feelings about them should not influence your recommendation.

5. It is entirely proper for a lawyer to talk to a witness about what testimony the witness would give if called to the courtroom. The witness should not be dis-

credited by talking to a lawyer about his or her testimony.

[828] 6. Your recommendation should not be influenced by feelings of prejudice, or by racial or ethnic bias, or by sympathy. Your recommendation must be based on the evidence, and on the law contained in these instructions.

An aggravating circumstance is a standard to guide the jury in making the choice between the alternative recommendations of life imprisonment without the possibility of parole or death. It is a statutorily enumerated circumstance which increases the gravity of a crime or the harm to a victim.

An aggravating circumstance must be proven beyond a reasonable doubt before it may be considered by you in arriving at your recommendation. In order to consider the death penalty as a possible penalty, you must determine that at least one aggravating circumstance has been proven.

The State has the burden to prove each aggravating circumstance beyond a reasonable doubt. A reasonable doubt is not a mere possible doubt, a speculative, imaginary or forced doubt. Such a doubt must not influence you to disregard an aggravating circumstance if you have an abiding [829] conviction that it exists. On the other hand, if, after carefully considering, comparing and weighing all the evidence, you do not have an abiding conviction that the aggravating circumstance exists, or, if, having a conviction, it is one which is not stable but one which wavers and vacillates, then the aggravating circumstance has not been proved beyond every reasonable doubt and you must not consider it rendering an advisory sentence to the Court.

It is to the evidence introduced during this proceeding, and to it alone, that you are to look for that proof.

A reasonable doubt as to the existence of an aggravating circumstance may arise from the evidence, conflicts in the evidence, or the lack of evidence. If you have a reasonable doubt as to the existence of an aggravating circumstance, you should find that it does not exist. However, if you have no reasonable doubt, you should find that the aggravating circumstance does exist and give it whatever weight you determine it should receive. The aggravating circumstances that you may consider are limited to any of the following that you find are established by the evidence.

[830] 1. The capital felony was committed while the defendant was engaged in the commission of any robbery.

2. The capital was especially heinous, atrocious or cruel.

Heinous means extremely wicked or shockingly evil.

Atrocious means outrageously wicked and vile.

Cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the sufferings of others.

The kind of crime intended to be included as heinous, atrocious or cruel is one accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily torturous to the victim.

The State may not rely upon a single aspect of the offense to establish more than one aggravating circumstance. Therefore, if you find that two or more of the

aggravating circumstances are proven beyond a reasonable doubt by a single aspect of the offense, you are to consider that as supporting only one aggravating circumstance.

If you find the aggravating circumstances do not justify the death penalty, your advisory [831] sentence should be one of life imprisonment without possibility of parole.

Should you find sufficient aggravating circumstances do exist to justify recommending the imposition of the death penalty, it will then be your duty to determine whether the mitigating circumstances outweigh the aggravating circumstances that you find to exist.

A mitigating circumstance is not limited to the facts surrounding the crime. It can be anything in the life of the defendant which might indicate that the death penalty is not appropriate for the defendant. In other words, a mitigating circumstance may include any aspect of the defendant's character, background or life or any other circumstance of the offense that reasonably may indicate that the death penalty is not an appropriate sentence in this case.

A mitigating circumstance need not be proved beyond a reasonable doubt by the defendant. A mitigating circumstance need only be proved by the greater weight of the evidence, which means evidence that more likely than not tends to prove the existence of a mitigating circumstance.

If you determine by the greater weight of the [832] evidence that a mitigating circumstance exists, you may consider it established and give the evidence each — excuse me. And give that evidence such weight as

you determine it should receive in reaching your conclusion as to the sentence to be imposed.

Among the mitigating circumstances you may consider are:

1. The defendant has no significant history of prior criminal activity.

2. The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

3. The victim was a participant in the defendant's conduct or consented to the act.

4. The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

5. The defendant acted under extreme duress and under the substantial domination of another person.

6. The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

[833] 7. The age of the defendant at the time of the crime.

8. The existence of any other factors in the defendant's character, background or life, or the circumstances of the offense that would mitigate against the imposition of the death penalty.

If one or more aggravating circumstances are established, you should consider all the evidence tending to establish one or more mitigating circumstances and give that evidence such weight as you determine it should receive in reaching your conclusion as to the sentence that should be imposed.

You have heard evidence about the impact of this homicide on the family, friends and community of Cynthia Harrison. This evidence was presented to show the victim's uniqueness as an individual and the resultant loss by Cynthia Harrison's death. However, you may have not consider this evidence as an aggravating circumstances. Your recommendation to the Court must be based on the aggravating circumstances and the mitigating circumstances upon which you have been instructed.

The sentence that you recommend to the court must be based upon the facts as you find them from [834] the evidence and the law. If, after weighing the aggravating and the mitigating circumstances, you determine that at least one aggravating circumstance is found to exist, and that the mitigating circumstances do not outweigh the aggravating circumstances, or, in the absence of mitigating factors, that the aggravating factors alone are sufficient, you may recommend that a sentence of death be imposed rather than a sentence of life in prison without the possibility of parole.

Regardless of your findings in this respect, however, you are neither compelled nor required to recommend a sentence of death. If, on the other hand, you determine that no aggravating circumstances are found to exist, or that the mitigating circumstances outweigh the aggravating circumstances, or, in the absence of mitigating factors, that the aggravating factors alone are not sufficient, you must recommend imposition of a sentence of life in prison without the possibility of parole rather than a sentence of death.

The process of weighing aggravating and mitigating factors to determine the proper punishment is not a mechanical process. The law [835] contemplates that

different factors may be given different weight or values by different jurors. In your decision-making process, you, and you alone, are to decide what weight is to be given to a particular factor.

In these proceedings it is not necessary that the advisory sentence of the jury be unanimous.

The fact that the jury can recommend a sentence of life imprisonment or death in this case on a single ballot should not influence you to act hastily or without due regard to the gravity of these proceedings. Before you ballot you should carefully weigh, sift, and consider the evidence, realizing that human life is at stake, and bring your best judgment to bear in reaching your advisory sentence.

If a majority of the jury, seven or more, determine that Timothy Lee Hurst should be sentenced to death, your advisory sentence will be:

A majority of the jury, by a vote of, blank, to, blank, advise and recommend to the court that it impose the death penalty upon Timothy Lee Hurst.

On the other hand, if by six or more votes [836] the jury determines that Timothy Lee Hurst should not be sentenced to death, your advisory sentence will be:

The jury advises and recommends to the court that it imposes a sentence of life imprisonment upon Timothy Lee Hurst without possibility of parole.

When you have reached an advisory sentence in conformity with these instructions, that form of recommendation should be signed by your foreperson, dated with today's date, and returned to the court. There is no set time for a jury to reach a verdict. Sometimes it only takes a few minutes. Other times it takes hours or even days. It all depends upon the com-

plexity of the case, the issues involved and the makeup of the individual jury.

You should take sufficient time to fairly discuss the evidence and arrive at a well reasoned recommendation.

All right. Before I release you there are some administrative things that I need to take care of. In every case where we pick a jury on Monday and we anticipate the trial going a lengthy period of time, we have an alternate. I'm going [837] to state that person's name, and then I want to talk to you for a moment. Which one is Giovanni Valentine?

Mr. Valentine, you will not be allowed to deliberate with these folks. You may be very disappointed that you have invested all week and are not going to be able to deliberate or you may be glad that you're going to be released at quarter til eleven this morning. Under any circumstance, we are very grateful to you. If you want to stay, you certainly can do so, obviously, not with the jury. But if you want to leave, you can call this afternoon and see if the advisory recommendation has been rendered. And if so, jury management will be more than happy to tell you what that recommendation was.

I have had circumstances where I have had a juror get sick. I've also had circumstances where a juror's family got sick. And if we hadn't had the alternate, we would not have been able to go forward. So we all thank you for your time and attention, and I'm going to ask you now if you will be excused. And security, if you will hand his notes and I guess his instructions to the clerk.

[838] All right. A couple of other things. As far as the evidence goes, I'm going to need counsel to come up

here and get together with the clerk and determine that all appropriate evidence is going back in the cart to the jury room.

Now let me explain something to you folks, and I think we touched on it a bit with one of the witnesses. Some of the evidence that is going back has a sticker on it that is marked bio hazard. What that means is that there is something on that particular piece of evidence that you do not need to touch with bare hands. So I'm also going to send back a box of gloves, as well. What may be the appropriate way to handle this is to appoint one person or to have one person volunteer, if that evidence is needed to be viewed, to put on gloves before you touch that piece of evidence. It not only protects you, it also protects the integrity of the evidence. Doesn't mean that you have to look at it. Doesn't even mean you have to take it out, but certainly as the jurors you are entitled to look at all of the evidence that was presented today.

Let's see. I'm also going to release you to the deputy. I have ordered that your lunch come [839] up at 11:45, which is a little bit earlier than usual.

Let me explain to you how this all works. The law requires that you folks deliberate as a body, as a group. I'm going to tell the security that you do not need to call me if they want to go down to stretch their legs or smoke a cigarette or go get a cup of coffee, or whatever you folks want to do. But when you leave the jury room, you must quit deliberating, because if you are downstairs and two people are over here talking about it and three people over here talking about it, you are not deliberating as a body. So do all your deliberations in the room. Leave at will as many times as you like, but don't resume until you get back in the room.

All right. You have — you will have the evidence with you. You will be able to take your notes with you. You will be able to take the instructions on the law, and you heard the argument from counsel. I'm not sure that there is anything else that we can give you, however, if you have any questions, write them down on your notepad. Give them to the security officer. He will give them to me. I will bring back counsel [840] and we will discuss it. If we can help you, we certainly will.

All right. At this time please retire to the jury room.

(Jury out to deliberate a verdict at 10:50 a.m.)

MR. MOLCHAN: Their instructions do not have a verdict form for every —

THE COURT: No, I just gave them to the clerk. No, we would not want 12 different verdicts, which is precisely what would happen. Are you getting a box of gloves on those?

THE CLERK: Yes.

THE COURT: Thank you.

COURT SECURITY: What if they want to hear the cassette tape?

THE COURT: Do you have something that they can play it?

MR. MOLCHAN: I've got my boom box, Judge.

THE COURT: She's delivering it as we speak.

THE CLERK: The old fashioned stuff.

THE COURT: Was everything opened?

MR. MOLCHAN: There is nothing — yeah, everything was opened.

THE COURT: All right. Mr. Molchan and Mr. [841] Doss, do you folks — do you folks want me to also tell the jury that if they don't want to handle the bio hazard but still want to review them, we will bring them in here and have someone else hold them up? I don't know whether they are going to be squeamish about that or not.

MR. MOLCHAN: I don't have really any opinion on that.

MR. DOSS: I don't have an opinion, Judge.

THE COURT: Okay. All right. Well, I told them if they wanted to give us any information or ask any questions, they could, so we'll just leave it as is.

MR. DOSS: I have a feeling there will be a couple willing to do it. That's my own personal read of them, but.

THE COURT: All right.

MR. MOLCHAN: You always find that there is always at least one or two that want to.

THE COURT: All right. Security, do you have everybody's cell phone number?

COURT SECURITY: I do.

THE COURT: All right. Then we are in recess until we have either a question or a recommendation.

[842] (Recess)

THE COURT: All right. I have received a question from the jury. The jury would like to know the definition of first degree murder and would like to

know the difference between first, second and third degree murder.

I, of course, will entertain suggestions from both sides as to how I am to respond to this. Mr. Molchan.

MR. MOLCHAN: I'm thinking, Judge.

THE COURT: Okay. I'll give y'all a second. Clearly, because this is the penalty phase only, this is a bit of an unusual question, although I can see, since they weren't the jury that tried the guilt phase, why they might have some curiosity as to that information.

(Pause)

THE COURT: I mean, this really is a difficult question, because, on the one hand, it really doesn't concern them. On the other, I don't know if these definitions and what he has actually been found culpable of —

MR. DOSS: Judge, I might make a suggestion. I was telling Mr. Molchan within 7.11.1 (A) we didn't read it on the back end, you read it on the [843] front end, but it specifically says that the court — the appellate court sent the case back to the court, with the instructions that the defendant is to have a new trial to decide what sentence should be imposed. Consequently, you will not concern yourselves with the question of his guilt.

The only thought additionally that I would have is, having made the argument that he's an accomplice, are they trying to assess —

THE COURT: That's exactly what they're —

MR. DOSS: — the culpability of Lee-Lee, is my alternate thought.

THE COURT: I believe that that's exactly what they are doing. I mean, by this question they are indicating that they don't understand the nuance of what he has been found guilty of and how that might play into the Lee-Lee Smith matter. That is my guess, as well.

MR. DOSS: Judge, I think if we can — I'm thinking out loud. I think if we go with the first one — if it really is the second, they can send out another question if it's the second. I think this is the safest answer.

MR. MOLCHAN: I agree.

[844] MR. DOSS: And if they really want it as to Lee-Lee Smith, maybe they'll come back and ask it maybe more artfully. That's just a — like I said, that's as much thinking out loud as anything, in a way to play it safe, to not tip anything as to what we think they're thinking about.

THE COURT: Now what you — and I was turning to it. What is it that you are saying? Just read 7.11.1 (A)?

MR. DOSS: Yes, Judge.

THE COURT: All right, folks. Let me think out loud, as well, when I'm talking to you, because the entire paragraph — really the only thing that addresses their question is the last sentence where it says: Consequently, you will not concern yourselves with the question of his guilt.

They realize that he's been found guilty of murder in the first degree. They realize that. They want to know what that means. And I'm not saying that I'm going to go any further. If you folks both agree that this is what we'll do, this is what we'll do. But I'm trying to see if we tailor it so — I mean, perhaps it would

be better [845] for me to say something along the lines of, you know, I've received your question, but since this is the penalty phase and he has already been found guilty of first degree, these definitions — you should not concern yourselves with these definitions, or something along those lines. Now I don't care. I'll do whatever you folks think is better, but it just seems to me that maybe just reading 1 (A), they're going to come back again potentially and say we know he's been guilty of first degree murder. We want to know what that means. But I will do it if that's what you both want me to do.

MR. DOSS: I think I prefer 1 (A), Judge, and if they want to follow it up, they can follow it up. And if not, maybe that will satisfy them.

MR. MOLCHAN: I'm good with 1 (A), Judge.

THE COURT: Okay. Bring them in.

COURT SECURITY: Yes, Judge.

THE COURT: I am going to tell them, however, that this is what I read them before jury selection and I am going to reread it for them now.

(Jury present)

COURT SECURITY: Jury's in the box, Your [846] Honor.

THE COURT: Let the record so reflect. Everyone please be seated.

I received two questions from the jury and I am going to read them, and then if there are no hands, I'm going to assume that I have read them correctly.

Define first degree murder.

Difference between first, second and third degree murder.

Let the record reflect that there are no hands.

All right. Folks, I read you an instruction prior to jury selection. I am going to read it again to you now.

In this case the defendant has been found guilty of murder in the first degree. An appellate court has reviewed and affirmed the defendant's conviction. However, the appellate court sent the case back to this court with instructions that the defendant is to have a new trial to decide what sentence should be imposed. Consequently, you will not concern yourself with the question of his guilt.

Now if you need anything further, please put [847] it on a piece of paper and we will attempt to answer it for you, but at this time I'm going to excuse you again.

(Jury out to deliberate a verdict at 12:15.)

MR. MOLCHAN: Should we just stand by, Judge, for a few minutes?

THE COURT: Yeah, please.

(Recess)

THE COURT: All right. It is my understanding that we have a verdict. First from the State, any reason I should not entertain the verdict?

MR. MOLCHAN: No, Your Honor.

THE COURT: From the defense?

MR. DOSS: Not that I know of, Judge.

THE COURT: All right. For the folks in the gallery, I have absolutely no idea what the verdict is going to be or what the recommendation is going to be. Some

of you may find it favorable. Some of you may find it a disappointment. The bottom line is, though, I do not want any sort of an outburst because that would be disrespectful to these people who have spent considerable amount of effort and time in reaching what they will have believed is a just [848] sentence. So if you are upset, take it outside. If you are happy, take it outside. All right. Bring in the jury.

COURT SECURITY: Yes, Your Honor.

(Jury present at 12:45.)

COURT SECURITY: Jury's in the box, Your Honor.

THE COURT: Let the record so reflect. Everyone please be seated. Sir, do we have a verdict?

JUROR: We do, Your Honor.

THE COURT: Hand it to the security, and I will review it and give it to the clerk to publish to the courtroom. Madam Clerk, if you would publish to the courtroom.

THE CLERK: In the Circuit Court, in and for Escambia County, Florida. State of Florida, Plaintiff, versus Timothy Lee Hurst, Defendant. Clerk number 1798 CF 001795 A.

Advisory sentence. A majority of the jury, by a vote of seven to five, advise and recommend to the court that it impose the death penalty upon Timothy Lee Hurst.

James J. Faxlanger, Foreperson. Dated March 9, 2012.

[849] THE COURT: Would anyone like the jury polled?

MR. DOSS: Yes, Judge.

THE COURT: Madam Clerk.

THE CLERK: Ladies and gentlemen of the jury, we are going to ask each of you individually concerning the advisory sentence. It is not necessary that you state how you personally voted or how any other person voted, but only if the advisory sentence as read was correctly stated.

Do you, Mr. Faxlanger, agree and confirm that a majority of the jury joined in the advisory sentence that you have just heard read?

JUROR: I do.

THE CLERK: Mr. Anderson, do you agree and confirm that a majority of the jury joined in the advisory sentence that you have just heard read?

JUROR: I do.

THE CLERK: Mr. Williams, do you agree and confirm that a majority of the jury joined in the advisory sentence that you have just heard read?

JUROR: I do.

THE CLERK: Mr. Preble, do you agree and confirm that a majority of the jury joined in the advisory sentence that you have just heard read?

[850] JUROR: I do.

THE CLERK: Ms. Swanson, do you agree and confirm that a majority of the jury joined in the advisory sentence that you have just heard read?

JUROR: I do.

THE CLERK: Ms. Feliciano, do you agree and confirm that a majority of the jury joined in the advisory sentence that you have just heard read?

JUROR: I do.

THE CLERK: Ms. Cranford, do you agree and confirm that a majority of the jury joined in the advisory sentence that you have just heard read?

JUROR: I do.

THE CLERK: Mr. Guthrie, do you agree and confirm that a majority of the jury joined in the advisory sentence that you have just heard read?

JUROR: I do.

MR. DOSS: Ms. Smith, do you agree and confirm that a majority of the jury joined in the advisory sentence that you have just heard read?

JUROR: I do.

MR. DOSS: Ms. Robinson, do you agree and confirm that a majority of the jury joined in the advisory sentence that you have just heard read?

JUROR: I do.

[851] THE CLERK: Ms. Lucas, do you agree and confirm that a majority of the jury joined in the advisory sentence that you have just heard read?

JUROR: I do.

THE CLERK: Mr. Stanfill, do you agree and confirm that majority of the jury joined in the advisory sentence that you have just heard read?

JUROR: I do.

THE CLERK: And I believe that's all.

THE COURT: Okay. All right. Any reason from the State I should not discharge the jury?

MR. MOLCHAN: No, Your Honor.

THE COURT: From the defense?

MR. DOSS: No, Your Honor.

THE COURT: All right. As you have seen all along the way, I've read from instructions because I have to make sure that all legal I's are dotted and T's are crossed, and I have one very brief instruction left to read you. But before you go, I do want to take an opportunity to speak to you directly.

I say in the opening instructions that we are all essential coworkers in the pursuit of justice, and I mean that with all my heart. My job is absolutely no more or less important than what the [852] attorneys do. Their job is no more or less important than what the jury does. We all come together to work to pursue justice. And for that, it is a privilege, but it's also an obligation. And as has been announced several times along the way in these proceedings, you folks came in and probably were not expecting what was laid at your feet. But if — obviously, if I couldn't get good folks to come down and sit as a jury, the system would fail. So we all want to thank you for your service, and now the last instruction.

Ladies and gentlemen, I wish to thank you for your time and consideration of this case. I also wish to advise you of some very special privileges enjoyed by jurors. No juror can ever be required to talk about the discussions that occurred in the jury room, except by court order. For many centuries our society has relied upon juries for consideration of difficult cases. We have recognized for hundreds of years that a jury's delibera-

tions, discussions and votes should remain their private affair as long as they wish it. Therefore, the law gives you a unique privilege not to speak about the jury's work. Although you are at liberty to speak with anyone about your [853] deliberations, you are also at liberty to refuse to speak to anyone. A request to discuss either your verdict or your deliberations may come from those who are simply curious, from those who might seek to find fault with you, from the media, from the attorneys or elsewhere. It will be up to you to decide whether to preserve your privacy as a juror.

Thank you very much. If you go down to the second floor, they will excuse you. Thank you.

(Jury out)

THE COURT: All right. Everyone can be seated. Obviously, we need to conduct a Spencer Hearing. I don't know whether you folks have your calendars or not, so if not, what I can do is I can go ahead and have Jane call you folks either this afternoon or Monday and find a mutually convenient time.

I know, Mr. Doss, you said you have something coming up at the end of month, I think, that you are also trying to prepare for.

MR. DOSS: I have two of them. I chair the death penalty conference at the end of next week and I've got another capital trial week, then, but I've got another capital trial scheduled to start [854] the last week of the month.

THE COURT: Then why don't I just have Jane call you folks on Monday. Are you going to be at your office on Monday, Mr. Doss?

MR. DOSS: In the afternoon, I should. I have court in the morning.

THE COURT: Okay. If she gets your recording she'll leave a message, and she can then set up a mutually convenient Spencer time.

MR. DOSS: And she always gets me by e-mail, too. That's the way she usually gets me.

THE COURT: All right. She knows how to find you, Mr. Doss.

MR. DOSS: Yes.

THE COURT: I've trained her well.

MR. DOSS: Yes.

THE COURT: All right. Then with that, I think at least for today we're adjourned.

THE CLERK: Judge, since the jail is going to question me about a date, do you want me to tell them to hold him until further notified by the Court.

THE COURT: Yes. And if it turns out to be a lengthy period of time, because I'm — Mr. Doss, what I'm saying is because the jail is going to be [855] calling us immediately because, obviously, under Mr. Hurst's status, it's taxing on their resources. If it's something that we can accommodate relatively quickly, I will keep him here. If it's something that because of your schedule, and Mr. Molchan has no objection to, and we put it off for a little while, then I'm going to go ahead and send him back down and ultimately bring him back. Is that okay with you?

MR. DOSS: I think we'll be able to set it where he can just stay here, Judge. I think we'll be able to set it.

THE COURT: Okay. All right. Understand next week I will have been — and it's unheard of — in 12 weeks of trial, I've been for ten weeks. And I'm in next

week, and I'm in the next week after that. It's just unbelievable lately how much trial time I have. But next week I start a full week of criminal trials. I don't know how many, though, I'm going to have all week. I may have a full day open up next week. I don't know if that's too soon to conduct a Spencer Hearing or not. I can tell you the week after that I have jury selection on a Monday, and I have a Tuesday and Wednesday that I'm trying to work in excess [856] criminal trials, because this obviously knocked my normal docket out of wack. I can always continue one of those. How long do you think the Spencer hearing is going to take?

MR. MOLCHAN: Really, Judge, from the State's standpoint, the State probably would not be providing any other information. I mean, that's our standard. I mean, that generally happens about 95 percent of the time, so I don't anticipate us providing anything other than our written memorandum or are getting ready for that portion of it.

MR. DOSS: Frankly, Judge, I don't have any idea. I've got to think about it.

THE COURT: And that's fine. And I'm not going to rush you at all. All I'm doing is telling you my perimeters, as well. So, you know, if I have a day open up next week and we can do it then, and both of you are available and prepared, that's fine. The following I have both Monday and Tuesday. I can force a continuation of one of those, because they are kind of add-ons, if that works for you. If not, you can tell Jane. But really, if it's going to be three or four weeks, I probably will send him and have him brought back, [857] or I will at least leave that decision up to the jail, okay? All right. Thank you.

(Proceedings concluded)

Supreme Court, U.S.
FILED
MAY 28 2015

No. 14-7505

IN THE

Supreme Court of the United States

TIMOTHY LEE HURST,
Petitioner,

v.

FLORIDA,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF FLORIDA

BRIEF FOR PETITIONER

NANCY A. DANIELS
PUBLIC DEFENDER
DAVID A. DAVIS
ASSISTANT PUBLIC
DEFENDER
Leon County Courthouse
301 South Monroe Street
Suite 401
Tallahassee, FL 32301

MARK E. OLIVE
LAW OFFICES OF
MARK E. OLIVE, P.A.
320 West Jefferson Street
Tallahassee, FL 32301

SETH P. WAXMAN
Counsel of Record
CATHERINE M.A. CARROLL
DAVID M. LEHN
FRANCESCO VALENTINI
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
seth.waxman@wilmerhale.com

ERIC F. FLETCHER
ALLISON TRZOP
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109

QUESTION PRESENTED

Whether Florida's death sentencing scheme violates the Sixth Amendment or the Eighth Amendment in light of this Court's decision in *Ring* v. *Arizona*, 536 U.S. 584 (2002).

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES vi

INTRODUCTION 1

OPINIONS BELOW 3

JURISDICTION 3

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 3

STATEMENT 4

A. Hurst's Trial, Initial Sentencing, And Post-Conviction Proceedings 4

B. Hurst's Resentencing 6

C. The Decision Under Review 12

SUMMARY OF ARGUMENT 14

ARGUMENT 17

I. FLORIDA'S CAPITAL SENTENCING SCHEME VIOLATES THE CONSTITUTION UNDER *RING* 17

A. Florida's Capital Sentencing Scheme Violates The Sixth Amendment Because The Judge Finds Facts Necessary For Imposition Of The Death Penalty 17

B. Florida's Capital Sentencing Scheme Violates The Eighth Amendment Because It Assigns To The Judge The Power To Impose The Death Penalty 26

TABLE OF CONTENTS—Continued

Page

II. THE JURY'S ADVISORY VERDICT DOES NOT IMPLY THE FINDING REQUIRED BY *RING* 31

III. IF THE JURY'S ADVISORY VERDICT IMPLIED THE FINDING REQUIRED BY *RING*, HURST'S SENTENCE WOULD VIOLATE THE CONSTITUTION FOR OTHER REASONS 34

A. Hurst's Sentence Would Violate The Eighth Amendment Because It Would Have Been Based On Jury Instructions That Misleadingly Minimized The Jury's Sense Of Responsibility 35

B. Hurst's Sentence Would Violate The Sixth And Eighth Amendments Because The Jury's Supposed Implied Finding May Have Been Made By Only A Simple Majority 36

1. The Sixth and Fourteenth Amendments forbid simple-majority jury verdicts 37

2. The Eighth and Fourteenth Amendments forbid Florida's simple-majority rule in capital cases 47

C. Hurst's Sentence Would Be Unconstitutional Because The Aggregate Effect Of The Defects In Florida's Capital Sentencing Scheme Subverts The Jury's Deliberative Function 52

CONCLUSION 54

TABLE OF CONTENTS—Continued

Page

APPENDIX: Pertinent Constitutional and Statutory Provisions

U.S. Const. amend VI 1a
U.S. Const. amend. XIV 1a
Fla. Stat. § 775.082 (2011) 1a
Fla. Stat. § 921.141 (2010) 8a

TABLE OF AUTHORITIES

CASES

Page(s)

Alford v. *State*, 307 So. 2d 433 (Fla. 1975) 8

Allen v. *United States*, 164 U.S. 492 (1896) 43

Alleyne v. *United States*, 133 S. Ct. 2151 (2013) 17, 23, 24, 25, 26, 46, 47

Andres v. *United States*, 333 U.S.740 (1948) 28, 38

Apodaca v. *Oregon*, 406 U.S. 404 (1972) 38, 38, 40, 45, 52

Apprendi v. *New Jersey*, 530 U.S. 466 (2000) 17, 19, 27, 39, 40, 49

Archuleta v. *Galetka*, 267 P.3d 232(Utah 2011) 43

Atkins v. *Virginia*, 536 U.S. 304 (2002) 10, 49

Ault v. *State*, 53 So. 3d 175 (Fla. 2010) 7

Baldwin v. *New York*, 399 U.S. 66 (1970) 41

Ball v. *State*, 70 S.E. 888 (Ga. Ct. App. 1911) 42

Baze v. *Rees*, 553 U.S. 35 (2008) 30

Beck v. *Alabama*, 447 U.S. 625 (1980) 47, 48, 50

Blakely v. *Washington*, 542 U.S. 296 (2004) 19, 23, 24, 25, 34

Bostick v. *State*, 773 N.E.2d 266 (Ind. 2002) 25

TABLE OF AUTHORITIES—Continued

Page(s)

Bottoson v. *Moore*, 833 So. 2d 693 (Fla. 2002) 9, 51

Brice v. *State*, 815 A.2d 314 (Del. 2003) 25

Burch v. *Louisiana*, 441 U.S. 130 (1979) 3, 17, 39, 41, 45, 52, 53

Caldwell v. *Mississippi*, 472 U.S. 320 (1985) 16, 35

Carter v. *State*, 980 So. 2d 473 (Fla. 2008) 21

Combs v. *State*, 525 So. 2d 853 (Fla. 1988) 21, 36

Davis v. *State*, 703 So. 2d 1055 (Fla. 1997) 9

Delgado v. *State*, 2015 Fla. LEXIS 871 (Fla. Apr. 23, 2015) 20

Duncan v. *Louisiana*, 391 U.S. 145 (1968) 25, 37

Eddings v. *Oklahoma*, 455 U.S. 104 (1982) 27, 48

Engle v. *State*, 438 So. 2d 803 (Fla. 1983) 8, 9

Espinosa v. *Florida*, 505 U.S. 1079 (1992) 21, 22, 31

Ex parte McGriff, 908 So. 2d 1024 (Ala. 2004) 25

Fisher v. *State*, 291 N.E. 2d 76 (Ind. 1973) 42

Ford v. *Wainwright*, 477 U.S. 399 (1986) 48

Franklin v. *State*, 965 So. 2d 79 (Fla. 2007) 34

Fulgham v. *State*, 46 So. 3d 315 (Miss. 2010) 42

Gardner v. *Florida*, 430 U.S. 349 (1977) 47

TABLE OF AUTHORITIES—Continued

Page(s)

Graham v. *Florida*, 560 U.S. 48 (2010) 50

Gregg v. *Georgia*, 428 U.S. 153 (1976) 30, 31, 47, 50, 51

Grossman v. *State*, 525 So. 2d 833 (Fla. 1988) 9, 21

Hall v. *Florida*, 134 S. Ct. 1986 (2014) 48, 49, 50

Harmelin v. *Michigan*, 501 U.S. 957 (1991) 51

Harris v. *Alabama*, 513 U.S. 504 (1995) 27, 30

Harris v. *United States*, 536 U.S. 545 (2002) 25

Hawaii v. *Mankichi*, 190 U.S. 197 (1903) 38

Hildwin v. *Florida*, 490 U.S. 638 (1989) 13, 19, 22

Holland v. *State*, 280 N.W.2d 288 (Wis. 1979) 42

Hurst v. *Florida*, 537 U.S. 977 (2002) 5

Johnson v. *Louisiana*, 406 U.S. 356 (1972) 38, 39, 45, 53

Jones v. *United States*, 526 U.S. 227 (1999) 15, 31, 33

Jones v. *United States*, 527 U.S. 373 (1999) 43, 49

TABLE OF AUTHORITIES—Continued

Page(s)

Kaczmar v. *State*, 104 So. 3d 990 (Fla. 2012) 8

Lockett v. *Ohio*, 438 U.S. 586 (1978) 48

McDonald v. *City of Chicago*, 561 U.S. 742 (2010) 38, 46

McGautha v. *California*, 402 U.S. 183 (1971) 28, 49

McKoy v. *North Carolina*, 494 U.S. 433 (1990) 49, 50

Mills v. *Maryland*, 486 U.S. 367 (1988) 47, 50, 51

Motion to Call Circuit Judge to Bench, 8 Fla. 459 (1859) 51

Newton v. *State*, 21 Fla. 53 (1884) 29

People v. *DeCillis*, 199 N.E.2d 380 (N.Y. 1964) 42

People v. *Russo*, 25 P.3d 641 (Cal. 2001) 42

Porter v. *McCollum*, 558 U.S. 30 (2009) 22

Prieto v. *Commonwealth*, 682 S.E.2d 910 (Va. 2009) 43

Proffitt v. *Florida*, 428 U.S. 242 (1976) 27

Ring v. *Arizona*, 536 U.S. 584 (2002) ..... *passim*

Roberts v. *Louisiana*, 428 U.S. 325 (1976) 48

Rodriguez Sanchez v. *State*, 503 So. 2d 436 (Fla. Dist. Ct. App. 1987) 51

Romano v. *Oklahoma*, 512 U.S. 1 (1994) 35

TABLE OF AUTHORITIES—Continued

Page(s)

Ross v. *State*, 386 So. 2d 1191 (Fla. 1980) 8, 20, 21

Russ v. *State*, 73 So. 3d 178 (Fla. 2011) 8, 20

Seminole Tribe of Florida v. *Florida*, 517 U.S. 44 (1996) 47

Sochor v. *Florida*, 504 U.S. 527 (1992) 32

Southern Union Co. v. *United States*, 132 S. Ct. 2344 (2012) 19, 25, 27

Spaziano v. *Florida*, 468 U.S. 447 (1984) 22, 26, 29, 30

Spencer v. *State*, 615 So. 2d 688 (Fla. 1993) 8, 20

State v. *Arceo*, 928 P.2d 843 (Haw. 1996) 42

State v. *Celis-Garcia*, 344 S.W.3d 150 (Mo. 2011) (en banc) 42

State v. *Dixon*, 283 So. 2d 1 (Fla. 1973) 8, 19

State v. *Dushame*, 616 A.2d 469 (N.H. 1992) 42

State v. *Hochstein*, 632 N.W.2d 273 (Neb. 2001) 42

State v. *Logue*, 28 S.E.2d 788 (S.C. 1944) 42

State v. *Steele*, 921 So. 2d 538 (Fla. 2006) 7, 8, 31, 32, 43

United States v. *Booker*, 543 U.S. 220 (2005) 23

United States v. *Dixon*, 509 U.S. 688 (1993) 46

TABLE OF AUTHORITIES—Continued

Page(s)

United States v. *Gaudin*, 515 U.S. 506 (1995) 24, 46

United States v. *Lopez*, 581 F.2d 1338 (9th Cir. 1978) 44

Walton v. *Arizona*, 497 U.S. 639 (1990) 15, 18, 22, 23, 31

Williams v. *Florida*, 399 U.S. 78 (1970) 52

Williams v. *State*, 967 So. 2d 735 (Fla. 2007) 8, 9, 20

Witherspoon v. *Illinois*, 391 U.S. 510 (1968) 30

Woodson v. *North Carolina*, 428 U.S. 280 (1976) 27, 28, 48, 49

Woodward v. *Alabama*, 134 S. Ct. 405 (2013) 26, 29

STATUTES AND RULES

10 U.S.C. § 852(a) 42

28 U.S.C. § 1257(a) 3

Ala. R. Crim. P. 23.1(a) 42

Alaska R. Crim. P. 31(a) 42

Ariz. Const. art. II, § 23 42

Ark. Code Ann.
§ 16-89-126(a) 42
§ 16-89-128 42

Cal. Const. art. I, § 16 42

TABLE OF AUTHORITIES—Continued

Page(s)

Colo. R. Crim. P. 31(a)(3) 42

Colo. Rev. Stat. Ann. § 16-10-108 42

Conn. Super. Ct. R. Crim. P § 42-29 42

Del. Super. Ct. R. Crim. P. 31(a) 42

Fla. R. Crim. P. 3.440 ..... 42, 51

Fla. Stat.
- § 775.082(1) (2011) 6, 18
- § 921.141 (2010)
  - § 921.141(1) 7
  - § 921.141(2) 6, 7
  - § 921.141(3) 6, 8, 9, 18, 20
  - § 921.141(4) 12
  - § 921.141(5) 7, 9
  - § 921.141(6) 7, 18

Fed. R. Crim. P 31(a) 42

Idaho Code Ann.
- § 19-2316 42
- § 19-2317 42

Idaho Crim. Ct. R. 31(a) 42

725 Ill. Comp. Stat. 5/115-4(o) 42

Ind. St. Ct. Jury R. 16(a) 42

Iowa R. Crim. P. 2.22(5) 42

Kan. Stat. Ann. § 22-3421 42

Ky. R. Crim. P. 9.82(1) 42

La. Code Crim. P. Ann. art. 782(A) 42

La. Const. art. I, § 17(A) 42

TABLE OF AUTHORITIES—Continued

Page(s)

Mass. R. Crim. P. 27(a) 42

Md. Const. Decl. of Rights, art. 21 42

Md. R. 4-327(a) 42

Me. R. Crim. P. 31(a) 42

Mich. Ct. R. 6.410(B) 42

Minn. R. Crim. P. 26.01, subd. 1(5) 42

Miss. Const. art. 3, § 31 42

Mo. Const. art. I, sec. 22(a) 42

Mont. Const. art. II, § 26 42

N.C. Const. art. I, § 24 42

N.C. Gen. Stat. § 15A-1201-(a) 42

N.D. Const. art. I, § 13 42

N.H. Const. Pt. 1, art. 15 42

N.J. Ct. R. 1:8-9 42

N.M. R. Crim. P. 5-611(A) 42

N.Y. Const. art. I, § 2 42

Neb. Const. art. I, § 6 42

Nev. Rev. Stat. § 175.481 42

Ohio R. Crim. P. 31(A) 42

Okla. Const. art. II, § 19 42

Or. Const. art. I, § 11 42

Pa. R. Crim. P. 648(B) 42

R. for Courts-Martial 1004(a)(2) 42

TABLE OF AUTHORITIES—Continued

Page(s)

R.I. Super. R. Crim. P. 31(a) 42

S.D. Codified Laws § 23A-26-1 42

Tenn. R. Crim. P. 31(a) 42

Tex. Code Crim. P.
art. 36.29(a) 42
art. 37.02 42
art. 37.03 42

Utah Const. art. I, § 10 42

Utah R. Crim. P. 21(b) 42

Va. Const. art. I, § 8 42

Va. S. Ct. R. 3A:17(a) 42

Vt. Const. ch. I, art. 10 42

Vt. R. Crim. P. 31(a) 42

W. Va. R. Crim. P. 31(a) 42

Wash. Super. Ct. Crim. R. § 6.16(a)(2) 42

Wis. Const.
art. I, § 5 42
art. 1, § 7 42

Wyo. Stat. § 7-11-501 42

OTHER AUTHORITIES

1 Annals of Cong. (1789) 40

1 Adams, John, *A Defence of the Constitutions of Government of the United States of America* (3d ed. 1797) 40

TABLE OF AUTHORITIES—Continued

Page(s)

American Bar Association, *Standards of Judicial Administration Relating to Trial Courts* (1992) 46

1 Bishop, Joel Prentiss, *Commentaries on the Law of Criminal Procedure* (1866) 41

3 Blackstone. Sir William, *Commentaries on the Laws of England* (1768) 40

4 Blackstone, Sir William, *Commentaries on the Laws of England* (1769) 40

Cooley, Thomas McIntyre, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* (1868) 41

Devine, Dennis J., et al., *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 Psychol. Pub. Pol'y & L. 622 (2001) 44

Douglass, John G., *Confronting Death: Sixth Amendment Rights at Capital Sentencing*, 105 Colum. L. Rev. 1967 (2005) 27

Ehrhardt, Charles W. & L. Harold Levinson, *Florida's Legislative Response to* Furman*: An Exercise in Futility?*, 64 J. Crim. L. & Criminology 10 (1973) 29

Iontcheva, Jenia, *Jury Sentencing as Democratic Practice*, 89 Va. L. Rev. 311 (2003) 28

TABLE OF AUTHORITIES—Continued

Page(s)

Jonakait, Randolph N., *The American Jury System* (2003) 44

Knowlton, Robert E., *Problems of Jury Discretion in Capital Cases*, 101 U. Pa. L. Rev. 1099 (1953) 29

Langbein, John H., *The Origins of Adversary Criminal Trial* (2003) 27

Lillquist, Erik, *The Puzzling Return of Jury Sentencing: Misgivings about* Apprendi, 82 N.C. L. Rev. 621 (2004) 27, 28

Proffatt, John, *A Treatise on Trial by Jury* (1880) 41

3 Story, Joseph, *Commentaries on the Constitution of the United States* (1833) 41

Sundby, Scott E., *War and Peace in the Jury Room: How Capital Juries Reach Unanimity*, 62 Hastings L.J. 103 (2010) 44

Taylor-Thompson, Kim, *Empty Votes in Jury Deliberations*, 113 Harv. L. Rev. 1261 (2000) 44

Tiffany, Joel, *A Treatise on Government, and Constitutional Law* (1867) 41

2 Wilson, James, *The Works of the Honourable James Wilson, L.L.D.* (1804) 40

IN THE

Supreme Court of the United States

No. 14-7505

TIMOTHY LEE HURST,
Petitioner,

v.

FLORIDA,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

INTRODUCTION

Under Florida law, a defendant convicted of a capital felony cannot be sentenced to death unless the State proves beyond a reasonable doubt at least one statutory aggravating circumstance. Because the existence of a statutory aggravator is a condition of the defendant's eligibility for a death sentence, its determination must "be entrusted to the jury." *Ring* v. *Arizona*, 536 U.S. 584, 597 (2002).

Florida law, however, assigns this factfinding role to the trial judge. In Florida, the court makes its own findings as to the existence of aggravating and mitigating circumstances and conducts its own weighing of those circumstances before imposing a sentence of its own determination. In doing so, the court may consider evidence that was never shown to a jury, and may find

aggravators that were not found by or even presented to a jury. Only the judge's written findings of fact are relevant on appellate review of a death sentence.

Florida juries play only an advisory role. The jury recommends a sentence of life or death based on its assessment of aggravating and mitigating circumstances, but that recommendation has no binding effect. Moreover, the jury renders its advisory verdict under procedures that degrade the integrity of the jury's function. Unanimity, and the deliberation often needed to achieve it, is not necessary; only a bare majority vote is required to recommend a death sentence. The jury makes no express findings on aggravating circumstances. And jurors voting for a death sentence need not even agree on which aggravating circumstance exists.

In this case, for example, the State presented two aggravators in arguing that petitioner Timothy Lee Hurst should be sentenced to death. The jury recommended a death sentence by a bare majority of seven to five. The jury made no express findings as to any aggravator. It is entirely possible that four jurors found one aggravator, and three found the other, but that at least two-thirds of the jurors rejected each. The trial court made its own findings that each aggravator existed beyond a reasonable doubt and imposed the death sentence based on its own weighing of the aggravating and mitigating circumstances.

Mr. Hurst's death sentence and the procedures it resulted from cannot stand. Florida's capital sentencing scheme contravenes this Court's holding in *Ring* that findings of fact necessary to authorize a death sentence may not be entrusted to the judge. It departs from the procedures that apply in every other State that allows death sentencing. And it undermines the

jury's basic Sixth and Eighth Amendment functions as responsible factfinder and voice of the community's moral judgment. This case thus arises "at the intersection of [this Court's] decisions" according capital defendants basic Sixth and Eighth Amendment protections in sentencing. *Burch* v. *Louisiana*, 441 U.S. 130, 137 (1979). Even if a State can constitutionally assign the jury only an advisory role, or permit different aggravators to be found by different jurors on different theories, or allow the jury to find aggravating circumstances by a bare majority, a State cannot do all these things at once without transgressing those constitutional protections.

OPINIONS BELOW

The opinion of the Supreme Court of Florida (JA289-321) is reported at 147 So. 3d 435. The order denying rehearing (JA322) is unpublished but is available at 2014 Fla. LEXIS 2652. The judgment of the Circuit Court, First Judicial Circuit, in and for Escambia County, Florida (JA272-288) is unreported.

JURISDICTION

The Supreme Court of Florida entered judgment on May 1, 2014, and denied a timely motion for rehearing on September 4, 2014. The petition for a writ of certiorari was filed on December 3, 2014. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Sixth and Eighth Amendments to the U.S. Constitution and Florida Statutes §§ 775.082 and 921.141 are reproduced in the Appendix to this brief.

STATEMENT

A. Hurst's Trial, Initial Sentencing, And Post-Conviction Proceedings

On May 2, 1998, Cynthia Lee Harrison was killed at a Popeye's Fried Chicken restaurant in Escambia County, Florida, where she worked as an assistant manager. Petitioner Timothy Lee Hurst, Harrison's coworker, was charged with first-degree murder, a capital felony under Florida law.

At Hurst's jury trial, the State presented evidence that on the day of Harrison's murder, Harrison and Hurst were scheduled to be at work at 8:00am in preparation for the restaurant's opening at 10:30am. JA27-28. A witness testified that he saw Harrison arrive at the restaurant between 7:00am and 8:30am and go inside, followed shortly thereafter by a man the witness later identified as Hurst. *Id.* Tonya Crenshaw, another assistant manager, testified that when she arrived at 10:30am, she found the door to the restaurant locked and another employee waiting outside with a delivery-truck driver. JA28. Crenshaw testified that when they entered the restaurant, they discovered that the safe was open and money was missing. JA28-29. The driver found Harrison's body in the freezer. Harrison's hands were bound with electrical tape, and she had tape over her mouth. Harrison had "suffered a minimum of sixty incised slash and stab wounds" and had "blood stains on the knees of her pants, indicating that she had been kneeling in her blood." JA29. According to the medical examiner, Harrison's wounds "were consistent with the use of a box cutter." *Id.*

Two of Hurst's friends, Michael Williams and "Lee-Lee" Smith, testified that Hurst told them he had killed Harrison and that he had previously talked about

robbing the restaurant. JA29-30. According to Smith, Hurst showed up at Smith's house on the morning of May 2 with a container of money. Smith said he washed Hurst's bloody pants and threw away Hurst's socks and shoes. JA30.

Smith's mother discovered the container of money the next day and contacted the police. JA30. In a garbage can at Smith's house, the police found a coin purse containing Harrison's driver's license and other personal items. They also found a bank bag marked with "Popeye's" and Harrison's name, a bank deposit slip bearing Hurst's fingerprints, and a blood-stained sock later determined to have "DNA typing ... consistent with the victim." JA30-31. Tape similar to that used to bind Harrison's hands and mouth was found in Hurst's car, and evidence indicated that Hurst had been seen with a box cutter several days before the murder. JA29.

The jury was instructed that it could find Hurst guilty of first-degree murder under two theories: "premeditated murder" and "felony murder"—*i.e.*, the "death occurred as a consequence of and while [Hurst] was engaged in the commission of Robbery." Jury Instructions 3-4, *State* v. *Hurst*, No. 98-1795-C (Fla. Escambia County Ct. Mar. 23, 2000). The jury convicted Hurst of first-degree murder, but its general verdict form did not specify which theory was the basis of the conviction. Verdict, *State* v. *Hurst*, No. 98-1795-C (Fla. Escambia County Ct. Mar. 23, 2000). Hurst was not separately convicted of any robbery in connection with Harrison's murder. JA308. After penalty-phase proceedings, Hurst was sentenced to death. The Supreme Court of Florida affirmed, JA27, and this Court denied Hurst's petition for a writ of certiorari, 537 U.S. 977 (2002).

On post-conviction review, the Supreme Court of Florida vacated Hurst's death sentence. JA127. Based on evidence presented at the post-conviction hearing, the court held that there was "no reasonable, strategic reason" for Hurst's attorney's failure to investigate or present evidence concerning Hurst's borderline intelligence—reflected in "an IQ of somewhere between 70 and 78" and "below average adaptive functioning skills"—or evidence that Hurst suffered from brain damage consistent with fetal alcohol syndrome. JA179-187. Counsel's failure, the court determined, "had an identifiable detrimental effect on the process of weighing the aggravation and mitigation in this case." JA190. The court ordered that Hurst be resentenced.

B. Hurst's Resentencing

1. Under Florida law, capital sentencing proceeds "according to the procedure set forth in § 921.141" of the Florida Statutes. Fla. Stat. § 775.082(1) (2011).[1] A death sentence can be imposed only if that procedure "results in findings by the court that such person shall be punished by death," *id.*, including a finding that at least one statutory aggravator exists, *id.* § 921.141(3)(a) (2010). Otherwise, "such person shall be punished by life imprisonment and shall be ineligible for parole." *Id.* § 775.082(1).

Under § 921.141, the trial court begins the separate penalty phase with a jury trial, but the jury's role is limited. "After hearing all the evidence," the jury must "deliberate and render an advisory sentence" recommending either life imprisonment or death. Fla. Stat.

---

[1] All citations of Florida Statutes are to the versions in effect when Hurst was resentenced. The current versions remain substantially the same in relevant respects.

§ 921.141(2).[2] Only "a majority vote is necessary for a death recommendation." *Ault* v. *State*, 53 So. 3d 175, 205 (Fla. 2010). The jury must consider:

> (a) [w]hether sufficient [statutory] aggravating circumstances exist ... ;
>
> (b) [w]hether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and
>
> (c) [b]ased on these considerations, whether the defendant should be sentenced to life imprisonment or death.

Fla. Stat. § 921.141(2); *see also id.* § 921.141(5)-(6) (listing aggravating and mitigating circumstances).

The jury may "return an advisory sentence in favor of death [only if] a majority of the jury ... find[s] beyond a reasonable doubt the existence of at least one aggravating circumstance." *Ault*, 53 So. 3d at 205. Florida law, however, "does not require jury findings on aggravating circumstances." *State* v. *Steele*, 921 So. 2d 538, 544 (Fla. 2006). The trial court is actually prohibited from using a special verdict form that would require the jury to record its vote on each aggravating factor presented to it. *Id.* at 544-548. Moreover, "[n]othing in [Florida law] ... requires a majority of the jury to agree on *which* aggravating circumstances exist." *Id.* at 545. As the Florida Supreme Court has explained, Florida law permits a jury to recommend a death sentence where four jurors believe one aggravator applies, and

---

[2] The court may admit evidence it deems "probative" and "relevant to the nature of the crime and the character of the defendant ..., regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements." Fla. Stat. § 921.141(1).

three jurors believe a second aggravator applies, because in that situation, "seven jurors believe that at least one aggravator applies." *Id.*

Once the jury has rendered its advisory sentence, the court may impose a death sentence only if it independently finds beyond a reasonable doubt that at least one "sufficient" aggravating circumstance exists and that the aggravators are not outweighed by any mitigating circumstances. *Williams* v. *State*, 967 So. 2d 735, 751 (Fla. 2007); *see also Kaczmar* v. *State*, 104 So. 3d 990, 1006 (Fla. 2012); *Alford* v. *State*, 307 So. 2d 433, 444 (Fla. 1975); *State* v. *Dixon*, 283 So. 2d 1, 9 (Fla. 1973). In making that determination, the court "is not bound by the jury's recommendation." *Williams*, 967 So. 2d at 751. Instead, the judge has "final authority to determine the appropriate sentence." *Id.*; *Engle* v. *State*, 438 So. 2d 803, 813 (Fla. 1983). Section 921.141(3) directs that "[n]otwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death." Although the court must give the jury's recommendation "great weight and serious consideration," the court "must still exercise its reasoned judgment in deciding whether the death penalty should be imposed." *Ross* v. *State*, 386 So. 2d 1191, 1197 (Fla. 1980). Thus, "the trial court is required to make independent findings on aggravation, mitigation, and weight." *Russ* v. *State*, 73 So. 3d 178, 198 (Fla. 2011).

To make those findings, the trial court typically conducts a separate sentencing hearing before the judge alone, known as a *Spencer* hearing, wherein both sides are given "an opportunity to be heard," "to present additional evidence," and "to comment on or rebut information in any presentence or medical report." *Spencer* v. *State*, 615 So. 2d 688, 690-691 (Fla. 1993).

The court may consider evidence and arguments that were not presented to the jury and may find aggravators that were not found by or presented to the jury. *Williams*, 967 So. 2d at 751; *Engle*, 438 So. 2d at 813; *see also Bottoson* v. *Moore*, 833 So. 2d 693, 709 (Fla. 2002); *Davis* v. *State*, 703 So. 2d 1055, 1061 (Fla. 1997).

If the court imposes the death sentence, it must "set forth in writing its findings." Fla. Stat. § 921.141(3). And it is those "written findings of fact and the trial record"—not the jury's advisory verdict—that "furnish the basis for [the Florida Supreme] Court's review of ... death sentences." *Grossman* v. *State*, 525 So. 2d 833, 839 (Fla. 1988), *receded from on other grounds in Franqui* v. *State*, 699 So. 2d 1312 (Fla. 1997).

2. Hurst's resentencing proceeded in accordance with these provisions of Florida law. On remand, the trial court first allowed evidence of aggravating and mitigating circumstances to be presented to the jury. *See* JA296. "[T]he State presented an abbreviated version of the trial testimony as to the circumstances of the murder," *id.*, and presented two aggravating circumstances to the jury: that Hurst had murdered Harrison while engaged in the commission of a robbery, and that the murder was "especially heinous, atrocious, or cruel," Fla. Stat. § 921.141(5)(d), (h); *see* JA959-960. Defense counsel invited the jury to question whether there was reasonable doubt as to those aggravating circumstances and what weight to give them, JA978-980, and "presented testimony concerning mitigation," JA296. In addition to Hurst's young age at the time of the murder, Hurst's lack of prior criminal history, and other mitigating circumstances, defense counsel contended that Hurst's capacity to conform his conduct to law was substantially impaired by low mental functioning. JA970-977, 980-981, 984.

Several of Hurst's relatives and teachers testified about Hurst's difficult childhood and limited mental capacity. For example, during pregnancy, Hurst's mother, who was just 15 years old at the time, "drank all day, every day." JA300. Hurst's school wanted to place him in a special-education program, but his mother objected. JA301. By the time of the murder, Hurst was a 19-year-old who "had to be reminded to take care of himself ... [and] to bathe and dress appropriately." *Id.*

Several expert witnesses testified about Hurst's intellectual disabilities. A psychiatrist opined that "Hurst has widespread abnormalities in multiple areas of his brain ... associated with lack of judgment, risk taking, impulsivity, and immaturity." JA302. Two psychologists testified that his IQ was as low as 69, and that he is mentally retarded. JA268-269, 302-304. The State's psychologist, however, emphasized Hurst's past testing "resulting in ... IQ scores of 76 and 78," and concluded "that Hurst does not meet the criteria for mental retardation." JA304.[3]

At the end of the penalty-phase trial, the court instructed the jury as to its "duty" "to advise the court" on Hurst's sentence. JA207. The instructions emphasized that:

> the final decision as to which punishment shall be imposed is the responsibility of the judge. ... However, the law requires you to render an advisory sentence as to which punishment should be imposed ...

---

[3] In light of this testimony, the trial court "determin[ed] that Hurst did not meet the test for mental retardation as a bar to the death penalty" under *Atkins* v. *Virginia*, 536 U.S. 304 (2002). JA304-306.

> Although the recommendation of the jury as to the penalty is advisory in nature and is not binding, the jury recommendation must be given great weight and deference by the Court in determining which punishment to impose.

JA207-208.

The court then instructed the jury that it could consider two aggravating circumstances: whether Hurst had committed the murder while engaged in the commission of a robbery, and whether the murder was "especially heinous, atrocious or cruel." JA211-212. The court also listed the mitigating circumstances the jury could consider, JA213-214, and explained the weighing of aggravating and mitigating circumstances required under § 921.141, JA215. Finally, the court instructed that "it is not necessary that the advisory sentence of the jury be unanimous." *Id.* Rather, "[i]f a majority of the jury, seven or more, determine that Timothy Lee Hurst should be sentenced to death, your advisory sentence will be" a recommendation of death. JA216.

After deliberating for less than two hours, the jury recommended a death sentence. The vote was seven to five. JA24-25. The verdict form did not identify any aggravators found, JA217, and the trial court denied Hurst's request "for an interrogatory verdict to specify the aggravators found and the votes on each," JA307.

After discharging the jury, the trial court held a *Spencer* hearing. JA218, 258. Hurst and the State each presented sentencing memoranda, but presented no additional evidence. JA230, 238, 258. Four months after the *Spencer* hearing, the court sentenced Hurst to death. JA271. The court stated that it had "independently weigh[ed] the aggravating and mitigating

circumstances." JA259. The court underscored that it had "carefully considered the evidence, the arguments of counsel, and the relevant legal authority." JA260. The court made no mention of the jury's advisory verdict, except to say it "ha[d] given [the jury's recommendation] great weight." JA271.

In its independent review of the sentencing evidence, the court found and assigned "great weight" to both aggravating circumstances presented by the State—that the murder was "committed while [Hurst] was engaged in the commission of a robbery" and that the murder was "especially heinous, atrocious or cruel." JA261-263. The court also found and assigned "moderate weight" to three mitigating circumstances: Hurst's lack of any significant criminal history, Hurst's young age at the time of the crime, and Hurst's "significant mental issues"—namely, his "limited intellectual capacity" and the "widespread abnormalities in his brain ... consistent with fetal alcohol syndrome," which affect "judgment and impulse control." JA263-270. Finally, the court concluded that, in its judgment, "the aggravating factors applicable to this crime outweigh the mitigating factors presented." JA271.

C. The Decision Under Review

On automatic appeal to the Supreme Court of Florida, *see* Fla. Stat. § 921.141(4), Hurst challenged his sentence on several grounds. Among other things, Hurst argued that, in light of *Ring* v. *Arizona*, 536 U.S. 584 (2002), "constitutional error occurred in his case because the advisory jury in the penalty phase was not required to find specific facts as to the aggravating factors, and

[because] the jury was not required to make a unanimous recommendation as to the sentence." JA307.[4]

The Florida Supreme Court rejected Hurst's arguments and affirmed the death sentence. The court observed that, before *Ring*, this Court had upheld Florida's capital sentencing scheme in *Hildwin* v. *Florida* on the ground that "'[t]he Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury.'" JA309 (quoting 490 U.S. 638, 640-641 (1989)). Florida courts had subsequently held that "*Ring* does not require the jury to make specific findings of the aggravators or to make a unanimous jury recommendation as to sentence." JA307. The Florida Supreme Court "decline[d] to revisit those decisions in [Hurst's] case." JA308. The court concluded that *Hildwin* remains good law because this Court "has never expressly overruled" it and because "Florida's sentencing procedures do provide for jury input about the existence of aggravating factors prior to sentencing—a process that was completely lacking in the Arizona statute struck down in *Ring*." JA309-310.

Justice Pariente dissented on the ground that "there was no unanimous jury finding of either of the two aggravating circumstances found by the trial

---

[4] Hurst also argued that the trial court had erred in rejecting his assertion of mental retardation as a bar to execution under *Atkins* and refusing to submit the question of mental retardation to the jury. JA297-298, 306. The Supreme Court of Florida rejected each of these contentions. JA298-307.

Hurst's petition for certiorari sought review of his *Atkins* claim, including the question whether the factual issues relevant to an *Atkins* claim must be submitted to the jury. Because the revised question as to which this Court granted review does not appear to encompass those issues, this brief does not address them.

judge." JA314. Justice Pariente observed that a defendant convicted of first-degree murder is not eligible for a death sentence in Florida unless additional findings of fact are made regarding aggravators and mitigators. JA316. And under *Ring*, all facts necessary for imposition of a sentence must be found by a jury. JA316-317. In Hurst's case, however, "the jury recommended death by the slimmest margin permitted under Florida law—a bare majority seven-to-five vote," and it was "actually possible that there was not even a majority of jurors who agreed that the same aggravator applied." JA315. In Justice Pariente's view, that outcome contravened *Ring*, *id.*, and raised "possible Eighth Amendment implications" in light of "Florida's outlier status" as the only State that does not require a unanimous jury finding of an aggravating circumstance before a death sentence may be imposed, JA319-320.

SUMMARY OF ARGUMENT

I. In *Ring* v. *Arizona*, this Court held that the Sixth Amendment right to a jury trial requires that the jury be entrusted with finding all facts necessary for imposition of the death penalty, including sentencing aggravators. 536 U.S. 584, 597 (2002). Florida's capital sentencing scheme, however, assigns that factfinding responsibility to the trial judge. Although in Florida a jury renders an advisory verdict recommending a sentence, the jury makes no express findings as to aggravating factors, and its recommendation of death is neither necessary nor sufficient for imposition of the death sentence. Rather, the court independently makes its own findings regarding aggravators and mitigators, and it is the court's factual findings—not the jury's—that authorize imposition of the death sentence. As this Court has recognized, a "Florida trial court no more has

the assistance of a jury's findings of fact with respect to sentencing issues than d[id] a trial judge in Arizona" under the scheme struck down in *Ring*. *Walton* v. *Arizona*, 497 U.S. 639, 648 (1990). Consequently, Florida's capital sentencing scheme violates the Sixth Amendment just as Arizona's did.

Florida's capital sentencing scheme violates the Eighth Amendment, too, because it permits the judge to impose the death penalty. In a concurring opinion in *Ring*, Justice Breyer concluded that "the Eighth Amendment requires that a jury, not a judge, make the decision to sentence a defendant to death." 536 U.S. at 614. Historically, the power to impose the death penalty was the province of the jury, not the judge. Today, nearly every jurisdiction that allows for the death penalty requires the jury to impose it. And only imposition by a jury, which embodies "the community's moral sensibility," ensures that the death penalty serves its sole legitimate penological function of retribution. *Id.* at 614-615.

II. In opposing certiorari in this case, the State argued that Hurst's sentence satisfies the Sixth Amendment because the jury's advisory verdict implied that "the jury ha[d] 'necessarily engag[ed] in the factfinding required for imposition of a higher sentence.'" Opp. 15 (quoting *Jones* v. *United States*, 526 U.S. 227, 250-251 (1999)). But no such inference can be drawn. The jury did not render explicit findings on aggravators. It was not required to agree on which, if any, of the two presented aggravators existed. And each aggravator could have been rejected by two-thirds of the jury. In any event, even if the jury had implicitly made determinate factual findings, that would not cure Florida's Sixth Amendment violation because it was the court's findings, not the jury's, that authorized the

death sentence. "Based solely on the jury's verdict ..., the maximum punishment [Hurst] could have received was life imprisonment." *Ring*, 536 U.S. at 597.

III. If this Court nonetheless concluded that Florida's capital sentencing scheme satisfied *Ring* because the jury's advisory verdict recommending death implied the necessary factual findings, Hurst's death sentence would violate the Sixth and Eighth Amendments for other reasons.

First, Hurst's sentence would violate the Eighth Amendment because the jury instructions would have misleadingly "minimize[d] the jury's sense of responsibility for determining the appropriateness of death." *Caldwell* v. *Mississippi*, 472 U.S. 320, 341 (1985). The jury was instructed that its sentencing verdict would be purely advisory and that ultimate responsibility for determining whether Hurst should be sentenced to death rested with the trial court. The jury was not instructed that a recommendation of death would authorize the trial court to impose the death sentence.

Second, Hurst's sentence would be unconstitutional because no inference can be drawn from the jury's recommendation that more than seven jurors found any aggravator. Neither the Sixth nor the Eighth Amendment—as incorporated under the Fourteenth Amendment—tolerates a death sentence based on such a slim vote. Florida's simple-majority rule contravenes centuries of practice recognizing unanimous verdicts as the norm in criminal cases. It departs from the uniform position of the federal system and 49 other States in capital and non-capital cases. It disregards the bedrock principle that the jury system is predicated on meaningful deliberations, which a simple-majority vote cannot safeguard. And it contradicts Florida's own judgment

that unanimity is necessary for all jury findings of guilt. This Court has never approved a verdict rendered by a simple-majority vote for any non-petty offense. It should not do so now, particularly in a capital case.

Finally, even if the Constitution permitted a death sentence to be imposed when the jury has been misled about its responsibility for the defendant's sentence, or has found necessary aggravating circumstances by only a bare majority, or has reached no agreement that any particular aggravator exists, a system that combines all of those features cannot stand. Hurst's sentence was imposed under a sentencing scheme that undermines the jury's deliberative function from every angle. The aggregate effect of Florida's procedures prevented the jury from engaging in the adequate "group deliberation" the Constitution requires. *Burch* v. *Louisiana*, 441 U.S. 130, 135 (1979).

ARGUMENT

I. FLORIDA'S CAPITAL SENTENCING SCHEME VIOLATES THE CONSTITUTION UNDER *RING*

A. Florida's Capital Sentencing Scheme Violates The Sixth Amendment Because The Judge Finds Facts Necessary For Imposition Of The Death Penalty

Under *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), and its progeny, "the Sixth Amendment provides defendants with the right to have a jury find" the "facts that increase the prescribed range of penalties to which a criminal defendant is exposed ... beyond a reasonable doubt." *Alleyne* v. *United States*, 133 S. Ct. 2151, 2160 (2013) (quotation marks omitted). In *Ring* v. *Arizona*, this Court applied that principle in the context of capital sentencing to hold that "the Sixth Amendment's jury

trial guarantee, made applicable to the States by the Fourteenth Amendment, requires that the aggravating factor determination be entrusted to the jury." 536 U.S. 584, 597 (2002) (footnote omitted).

Florida's capital sentencing scheme violates this principle because it entrusts to the trial court instead of the jury the task of "find[ing] an aggravating circumstance necessary for imposition of the death penalty." *Ring*, 536 U.S. at 609. Although in Florida a jury renders an advisory verdict recommending a sentence based on its assessment of aggravators, mitigators, and the balance between them, the jury makes no express findings as to aggravators, and its recommendation of death is neither necessary nor sufficient to authorize a death sentence and therefore does not bring Florida's scheme into line with the Sixth Amendment. As this Court has already observed, a "Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than d[id] a trial judge in Arizona" under the capital sentencing scheme struck down in *Ring*. *Walton* v. *Arizona*, 497 U.S. 639, 648 (1990). Consequently, as *Ring* made clear when it invalidated Arizona's scheme, Florida's scheme is also invalid.

1. Florida law permits the death penalty to be imposed if and only if the sentencing proceeding "results in findings *by the court* that [the defendant] shall be punished by death." Fla. Stat. § 775.082(1) (emphasis added). The court must find beyond a reasonable doubt that at least one "sufficient" statutory aggravating circumstance exists (and that the aggravators are not outweighed by mitigating circumstances). *Id.* § 921.141(3). "[O]therwise," Florida law states, the defendant "shall be punished by life imprisonment." *Id.* § 775.082(1). Thus, "[t]he aggravating circumstances of Fla. Stat. § 921.141(6) actually define those crimes ... to

which the death penalty is applicable in the absence of mitigating circumstances." *State* v. *Dixon*, 283 So. 2d 1, 9 (Fla. 1973). Florida law, therefore, violates the principle set down in *Ring* that States may not entrust the judge with finding any aggravating circumstances necessary to authorize a death sentence.

Before *Apprendi*, this Court upheld Florida's capital sentencing scheme against a similar Sixth Amendment challenge. In *Hildwin* v. *Florida*, the Court declared that because "an aggravating factor here is not an element of the offense but instead ... 'a sentencing factor ...,' the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." 490 U.S. 638, 640-641 (1989). But *Apprendi*, *Ring*, and subsequent decisions "have uniformly rejected [the assumption] that in determining the maximum punishment for an offense, there is a constitutionally significant difference between a fact that is an 'element' of the offense and one that is a 'sentencing factor.'" *Southern Union Co.* v. *United States*, 132 S. Ct. 2344, 2356 (2012). When "an aggravating circumstance [is] necessary for imposition of the death penalty," as it is under Florida law, it "operate[s] as the functional equivalent of an element of a greater offense" and therefore must "be found by a jury." *Ring*, 536 U.S. at 609; *see also Apprendi*, 530 U.S. at 482-483, 494 n.19. *Hildwin* does not survive those later decisions.[5]

---

[5] Even if *Hildwin* remained valid, it would not control here because one of the aggravators there was that the defendant "had previous convictions for violent felonies," 490 U.S. at 639, and so it would fit the exception to *Apprendi* and *Ring* for the "fact of a prior conviction." *Blakely* v. *Washington*, 542 U.S. 296, 301 (2004). Neither aggravating circumstance presented here fits that exception.

2. The Florida trial judge's duty to give "great weight" to the jury's "advisory sentence" does not spare Florida's capital sentencing scheme from constitutional invalidity under *Ring* by elevating the jury to the role of sentencing factfinder, or even quasi-factfinder. In Florida, authorization to impose the death penalty derives solely from the trial court's independent findings regarding aggravating and mitigating circumstances; the jury's advisory verdict is not necessary or sufficient to authorize the death penalty.

Time and again, the Florida Supreme Court has declared that although the jury's sentencing recommendation carries "great weight," the trial judge "must conduct an independent analysis of the aggravating and mitigating circumstances," "regardless of the jury's recommendation." *Delgado* v. *State*, 2015 Fla. LEXIS 871, at *27-28 (Fla. Apr. 23, 2015) (quotation marks omitted); *see also, e.g.*, Fla. Stat. § 921.141(3) (trial court must determine appropriate sentence "[n]otwithstanding the recommendation of a majority of the jury"); *Russ* v. *State*, 73 So. 3d 178, 198 (Fla. 2011) ("[T]he trial court is required to make independent findings on aggravation, mitigation, and weight."); *Williams* v. *State*, 967 So. 2d 735, 751 (Fla. 2007) (court "is not bound by the jury's recommendation, and is given final authority to determine the appropriate sentence" (quotation marks omitted)); *Ross* v. *State*, 386 So. 2d 1191, 1197 (Fla. 1980) ("The trial court must still exercise its reasoned judgment in deciding whether the death penalty should be imposed."). The trial court is thus free to consider sentencing evidence and to find aggravators that were never considered or found by the jury, *Williams*, 967 So. 2d at 751; *Spencer* v. *State*, 615 So. 2d 688, 691 (Fla. 1993), and to impose the death penalty even where the jury has recommended a life

sentence, *see, e.g.*, *Grossman* v. *State*, 525 So. 2d 833, 840 (Fla. 1988), *receded from on other grounds in Franqui* v. *State*, 699 So. 2d 1312 (Fla. 1997). And it is the trial court's findings, not the jury's advisory verdict or any findings arguably implicit in it, that the Florida Supreme Court reviews. *Grossman*, 525 So. 2d at 839.

Consequently, the Florida Supreme Court has made clear that the "great weight" accorded the jury's sentencing recommendation does not make the verdict anything other than purely "advisory," and it has dismissed the suggestion that the jury functions as "de facto, if not de jure, sentencer" in capital cases. *Grossman*, 525 So. 2d at 839-840. In *Combs* v. *State*, for example, the Florida Supreme Court held that the trial court was not required to instruct the jury that "a life sentence carries substantial weight and that a jury recommendation of life could be overridden only if virtually no reasonable person could differ." 525 So. 2d 853, 855-858 (Fla. 1988). Such an instruction would have been improper because "the court is the final decision-maker and the sentencer—not the jury," and "the jury's sentencing recommendation in a capital case is *only advisory*." *Id.* (quotation marks omitted); *accord Espinosa* v. *Florida*, 505 U.S. 1079, 1081 (1992) (noting State's assertion that "in the Florida scheme, the jury is not 'the sentencer' ... because the trial court is not bound by the jury's sentencing recommendation"). In fact, the Florida Supreme Court has criticized trial judges for relying too heavily on the advisory verdict, but not for relying too little. *Compare Ross*, 386 So. 2d at 1197 (vacating death sentence where "the trial court gave undue weight to the jury's recommendation of death and did not make an independent judgment of whether or not the death penalty should be imposed"), *with Carter* v. *State*, 980 So. 2d 473, 483-484 (Fla. 2008)

(no abuse of discretion even though trial court did "not expressly consider[] the jury's recommendation").

This Court too has repeatedly recognized that, "[i]n Florida, the jury's sentencing recommendation in a capital case is only advisory." *Spaziano* v. *Florida*, 468 U.S. 447, 451 (1984); *see also Espinosa*, 505 U.S. at 1080; *Walton*, 497 U.S. at 648; *Porter* v. *McCollum*, 558 U.S. 30, 40-41 (2009).

3. The Florida Supreme Court nonetheless denied Hurst's *Ring* challenge because "Florida's sentencing procedures do provide for *jury input* about the existence of aggravating factors prior to sentencing—a process that was completely lacking in the Arizona statute struck down in *Ring*." JA310 (emphasis added). "Jury input" may be a fair description of the role played by the advisory verdict in Florida, but it is insufficient to satisfy the Sixth Amendment—as this Court has already recognized.

In *Walton*, the defendant challenged Arizona's capital sentencing scheme under the Sixth Amendment. The Court began by reiterating *Hildwin*'s now-rejected dictate that "'the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury.'" 497 U.S. at 648 (quoting 490 U.S. at 640-641). The defendant in *Walton* attempted to avoid *Hildwin*'s implications by distinguishing Florida's scheme from Arizona's—just as the court below did here—on the ground that Arizona's scheme did not provide for any advisory jury verdict. This Court deemed that "distinction[] ... not persuasive." *Id.* at 648. Because a jury in Florida "does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances and its recommendation is not binding on the trial judge," the

Court concluded, a "Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona." *Id.*

Subsequently in *Ring*, this Court "overrule[d] *Walton* to the extent that it allow[ed] a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty." 536 U.S. at 609. Because this Court had rejected the very distinction the court below sought to draw between Arizona's and Florida's capital sentencing schemes, *Ring*'s invalidation of Arizona's capital sentencing scheme applies with equal force to Florida's.

Even apart from the Court's prior recognition that Florida's scheme is not meaningfully different from the Arizona scheme struck down in *Ring*, the availability of the jury's *advice*—of its mere "input"—does not satisfy the Sixth Amendment right to a jury trial. The Court has repeatedly said that the Sixth Amendment prohibits entrusting the judge with "finding" the facts necessary to impose the sentence. *Ring*, 536 U.S. at 597, 602; *United States* v. *Booker*, 543 U.S. 220, 232 (2005); *Alleyne*, 133 S. Ct. at 2160. Across the many cases in which the Court has considered the role of the jury since *Apprendi* and *Ring*, it has never suggested that such a Sixth Amendment defect could be cured simply by having the jury provide *advice*.

The Court's silence reflects the reality that an advisory role would not serve the jury's essential function in preserving liberty. The jury-trial right "is no mere procedural formality, but a fundamental reservation of power in our constitutional structure." *Blakely* v. *Washington*, 542 U.S. 296, 305-306 (2004). Thus, the "historic role of the jury" has been as "an intermediary between the State and criminal defendants." *Alleyne*,

133 S. Ct. at 2161. When the Sixth Amendment was ratified, juries functioned as factfinders. *Ring*, 536 U.S. at 599. That is the traditional role *Apprendi* and *Ring* restored. But if a State could depart from that tradition and assign the jury an advisory role while vesting the judge with responsibility for essential factfinding, as Florida has, it could "relegate[] [the jury] to making a determination that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the State *actually* seeks to punish." *Blakely*, 542 U.S. at 307. For example, much as this Court has feared before, under Florida's view of the Sixth Amendment, "a judge could sentence a man for committing murder even if the jury convicted him only of illegally possessing the firearm used to commit it[,] or of making an illegal lane change while fleeing the death scene"—as long as the jury also offered the judge its recommendation as to whether the judge should find him guilty of murder. *Id.* at 306-307. If that were permissible, "[t]he jury could not function as circuitbreaker in the State's machinery of justice." *Id.* at 306.

4. For the reasons discussed above, *Ring*'s overturning of *Walton* decisively repudiated *Hildwin* as well. But even if that were not so, principles of *stare decisis* would not stand in the way of now expressly overruling *Hildwin* and holding Florida's capital sentencing scheme unconstitutional under *Ring*. "*[S]tare decisis* cannot possibly be controlling" where the constitutional precedent involves "a procedural rule [that] does not serve as a guide to lawful behavior" and where "the [precedent] has been proved manifestly erroneous, and its underpinnings eroded, by subsequent decisions of this Court." *United States* v. *Gaudin*, 515 U.S. 506, 521 (1995); *see also Alleyne*, 133 S. Ct. at 2163 n.5 ("The

force of *stare decisis* is at its nadir in cases concerning procedural rules that implicate fundamental constitutional protections.").

That is the case here. The Sixth Amendment's bar against entrusting a judge with finding any circumstance necessary to authorize the death penalty is a fundamental rule of constitutional procedure. *Alleyne*, 133 S. Ct. at 2163 n.5 (*Apprendi* "concern[s] procedural rules that implicate fundamental constitutional protections"); *Blakely*, 542 U.S. at 305-306 (right to jury trial is "a fundamental reservation of power in our constitutional structure"); *Duncan* v. *Louisiana*, 391 U.S. 145, 148-149 (1968) (right to jury trial is "fundamental right"). As detailed above, from *Apprendi* through *Alleyne*, this Court has adopted and reinforced a view of the Sixth Amendment that is utterly inconsistent with *Hildwin*'s underpinnings—and it has overturned other similarly aberrant precedents along the way. *See Ring*, 536 U.S. at 608-609 (overturning *Walton*); *Alleyne*, 133 S. Ct. at 2155 (overturning *Harris* v. *United States*, 536 U.S. 545 (2002)). Moreover, given that "*Apprendi* [and *Ring* are] now more than a decade old," any "reliance interests" Florida might claim in *Hildwin* "are by this point attenuated." *Southern Union*, 132 S. Ct. at 2357.

Tellingly, the three other States that, at the time of *Ring*, had "hybrid systems, in which the jury renders an advisory verdict but the judge makes the ultimate sentencing determinations," *Ring*, 536 U.S. at 608 n.6, modified their capital sentencing schemes after *Ring* to ensure that the jury makes all findings necessary for imposition of the death penalty (even if the judge still selects the sentence). *See Brice* v. *State*, 815 A.2d 314, 320 (Del. 2003); *Bostick* v. *State*, 773 N.E.2d 266, 273 (Ind. 2002); *Ex parte McGriff*, 908 So. 2d 1024, 1037 (Ala. 2004).

Therefore, because Florida's outlier capital sentencing scheme entrusts to the trial court the task of finding facts necessary for imposition of the death penalty, and because the jury's advisory role does not meaningfully distinguish Florida's scheme from the Arizona scheme struck down in *Ring*, Florida's scheme violates the Sixth Amendment and must also be struck down. This Court should no longer countenance "the repeated spectacle of a man's going to his death [in Florida] because a *judge* found that an aggravating factor existed." *Ring*, 536 U.S. at 612 (Scalia, J., concurring).

B. Florida's Capital Sentencing Scheme Violates The Eighth Amendment Because It Assigns To The Judge The Power To Impose The Death Penalty

In a concurring opinion in *Ring*, Justice Breyer concluded that "the Eighth Amendment requires that a jury, not a judge, make the decision to sentence a defendant to death." 536 U.S. at 614; *see also Woodward* v. *Alabama*, 134 S. Ct. 405, 406-410 (2013) (Sotomayor, J., dissenting from denial of certiorari). That conclusion is correct. In *Spaziano*, this Court found no Eighth Amendment violation in Florida's commitment of capital sentencing to judges. 468 U.S. at 464-465. But it is clear that each of the three guideposts of this Court's Eighth Amendment jurisprudence—history, current practice, and independent judgment—compels the opposite conclusion: juries, not judges, must be responsible for imposing the death penalty. Nor can *Spaziano* be salvaged on *stare decisis* grounds, for "[t]he force of *stare decisis* is at its nadir in cases concerning procedural rules that implicate fundamental constitutional protections." *Alleyne*, 133 S. Ct. at 2163 n.5. In answer to the Court's question whether Florida's capital

sentencing scheme violates the Eighth Amendment in light of *Ring*, the Court should therefore overrule *Spaziano* and restore Florida juries to their traditional and appropriate role as sentencers in capital cases.[6]

1. Historically, the power to impose the death penalty was the province of the jury, not the judge. English criminal law "prescribed a particular sentence for each offense," *Apprendi*, 530 U.S. at 479, and the penalty for many felonies was fixed at death. *See, e.g.*, *Woodson* v. *North Carolina*, 428 U.S. 280, 289 (1976) (joint opinion); *Eddings* v. *Oklahoma*, 455 U.S. 104, 110-111 (1982); *Southern Union*, 132 S. Ct. at 2361 (Breyer, J., dissenting). Juries routinely exercised this sentencing discretion by "issuing 'partial verdicts' or 'downvaluing' stolen goods"—practices "immortalized through Blackstone's colorful phrase, 'pious perjury.'" Douglass, *Confronting Death: Sixth Amendment Rights at Capital Sentencing*, 105 Colum. L. Rev. 1967, 2013 (2005).[7] In fact, since most eighteenth-century criminal trials lacked "contested inquiries into guilt or innocence," the primary function of the jury trial "was to decide the sanction." Langbein, *The Origins of Adversary Criminal Trial* 59 (2003).

---

[6] To the extent the Court suggested in *Proffitt* v. *Florida*, 428 U.S. 242, 252 (1976), or *Harris* v. *Alabama*, 513 U.S. 504 (1995), that jury sentencing is not constitutionally required in capital cases, those suggestions are unavailing for the same reasons that counsel in favor of overruling *Spaziano*.

[7] Judges did have some power to effect a downward departure from a jury-imposed death sentence by seeking a royal pardon. Lillquist, *The Puzzling Return of Jury Sentencing: Misgivings about* Apprendi, 82 N.C. L. Rev. 621, 638 (2004). But no authority suggests that a judge could unilaterally impose a death sentence against the jury's verdict.

American juries similarly held unilateral power to impose the death penalty. For example, in homicide cases, juries "had the option of (1) convicting the defendant of murder, which carried a mandatory death sentence; (2) convicting the defendant of manslaughter, which was not a capital crime; or (3) acquitting the defendant." Lillquist, *The Puzzling Return of Jury Sentencing: Misgivings about* Apprendi, 82 N.C. L. Rev. 621, 648 (2004). In effect, this "g[a]ve the jury not only the power of conviction, but also the power of execution." *Id.*; *see also* Iontcheva, *Jury Sentencing as Democratic Practice*, 89 Va. L. Rev. 311, 323 (2003) ("More than factfinders, juries decided the fate of the defendants they convicted.").

In the early nineteenth century, many American States became concerned about the harshness of mandatory death penalties, as well as the rate of "mercy" acquittals of guilty defendants. *Woodson*, 428 U.S. at 289-290. The States responded by giving juries *more* power over sentencing. The first wave of reforms created new categories of homicide, which gave juries more discretion to convict defendants of non-capital homicide. *Id.* at 290. As that option failed to resolve the concern, States gave juries yet more sentencing authority, "forthrightly granting juries the discretion which they had been exercising in fact." *McGautha* v. *California*, 402 U.S. 183, 199-200 (1971), *vacated on other grounds sub nom. Crampton* v. *Ohio*, 408 U.S. 941 (1972); *see also Woodson*, 428 U.S. at 289-290.

2. The jury's authority over capital sentencing remained consistent in the twentieth century despite shifts in American views regarding capital punishment. *See, e.g.*, *Andres* v. *United States*, 333 U.S. 740, 758 (1948) (Frankfurter, J., concurring) (jury had power over sentencing in all but three of 43 States with death

penalty); Knowlton, *Problems of Jury Discretion in Capital Cases*, 101 U. Pa. L. Rev. 1099, 1100-1101 (1953) ("[T]hirty-five states and the Federal Government provide that the jury shall determine whether the death penalty shall be imposed, four provide that the jury may recommend the punishment to be inflicted but that such recommendation shall not be binding upon the judge, and six have abolished the death penalty for murder, leaving only three that still require capital punishment" (footnotes omitted)).[8] In *Spaziano* itself, this Court recognized that among the States that had reinstated the death penalty after *Furman*, "the majority view [was] that capital sentencing ... should be performed by a jury." 468 U.S. at 463 (30 of 37 jurisdictions with capital sentencing statutes "give the life-or-death decision to the jury").

The consensus of other jurisdictions continues to make jury sentencing the norm in the modern era of bifurcated (or trifurcated) capital sentencing. In 27 of the 31 States that maintain the death penalty, as well as in the federal system, the jury makes the final decision whether to impose the death penalty. *See Woodward*, 134 S. Ct. at 407 (Sotomayor, J., dissenting from denial of certiorari).[9] Only Florida, Alabama, Delaware, and Montana leave the final sentencing decision to the court. *Id.*

---

[8] When this Court decided *Furman*, Florida, too, "gave the jury complete life-or-death discretion." Ehrhardt & Levinson, *Florida's Legislative Response to* Furman*: An Exercise in Futility?*, 64 J. Crim. L. & Criminology 10, 17 (1973). Juries in Florida had authority to choose between death and life sentences for nearly 100 years. *See Newton* v. *State*, 21 Fla. 53, 100 (1884).

[9] Nebraska, which also left the capital sentencing decision to the judge, *Woodward*, 134 S. Ct. at 407, abolished the death penalty by statute enacted on May 27, 2015.

3. Finally, evaluating the relevant penological interests confirms that juries should make the final decision as to life or death in capital cases. "[U]nless a criminal sanction serves a legitimate penological function, it constitutes 'gratuitous infliction of suffering' in violation of the Eighth Amendment." *Baze* v. *Rees*, 553 U.S. 35, 78 (2008) (Stevens, J., concurring); *Gregg* v. *Georgia*, 428 U.S. 153, 183 (1976) (joint opinion). Of the principal functions of criminal sentencing—rehabilitation, incapacitation, deterrence, and retribution—only retribution provides a constitutionally defensible basis for application of the death penalty. *Baze*, 553 U.S. at 79 (Stevens, J., concurring); *Ring*, 536 U.S. at 614-615 (Breyer, J., concurring).[10] But, as Justice Breyer explained in his *Ring* concurrence, "[i]n respect to retribution, jurors possess an important comparative advantage over judges." *Id.* at 615. Juries "are more attuned to 'the community's moral sensibility'" and "'reflect more accurately the composition and experiences of the community as a whole.'" *Id.* (quoting *Spaziano*, 468 U.S. at 481, 486 (Stevens, J., concurring in part and dissenting in part)). As a result, they more faithfully "express the conscience of the community on the ultimate question of life or death" in a specific case. *Witherspoon* v. *Illinois*, 391 U.S. 510, 519 (1968). By contrast, Florida's transfer of the ultimate sentencing decision "to a lone government official's decree," *Harris*, 513 U.S. at 522-523 (Stevens, J., dissenting),

---

[10] Rehabilitation does not apply, and incapacitation is accomplished by a life sentence without possibility of parole. *Baze*, 553 U.S. at 78 (Stevens, J., concurring); *Ring*, 536 U.S. at 615 (Breyer, J., concurring). And "there remains no reliable statistical evidence that capital punishment in fact deters potential offenders." *Baze*, 553 U.S. at 79 (Stevens, J., concurring); *see also Ring*, 536 U.S. at 614-615 (Breyer, J., concurring). Reliance on these interests in *Spaziano*, 468 U.S. at 461-462, was misplaced.

unmoors the death penalty from its function as an "express[ion of] the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death." *Gregg*, 428 U.S. at 184 (joint opinion); *see also id.* at 183 ("[C]apital punishment is an expression of society's moral outrage at particularly offensive conduct."). And, in so doing, Florida's scheme undermines the reliability of the punishment as a reflection of contemporary moral values.

II. THE JURY'S ADVISORY VERDICT DOES NOT IMPLY THE FINDING REQUIRED BY *RING*

In opposing certiorari in this case, the State argued that where the jury has recommended a sentence of death, "the jury has 'necessarily engag[ed] in the fact-finding required for imposition of a higher sentence.'" Opp. 15 (quoting *Jones* v. *United States*, 526 U.S. 227, 250-251 (1999)). On that view, there was no *Ring* violation in this case because the jury's advisory verdict recommending death implied that it had found at least one aggravating factor, thereby authorizing the trial court to impose the death penalty. This contention is both factually wrong and unavailing under *Ring*.

1. It cannot be inferred that the jury found any particular aggravator. The jury certainly did not make explicit findings on aggravators. *See* JA217. Florida prohibits the trial court from "using a penalty phase special verdict form that details the jurors' determination concerning aggravating factors." *State* v. *Steele*, 921 So. 2d 538, 548 (Fla. 2006); *see also Espinosa*, 505 U.S. at 1080 ("verdict does not include specific findings of aggravating and mitigating circumstances"); *Walton*, 497 U.S. at 648 ("[I]n Florida the jury ... does not make specific factual findings with regard to the existence of

mitigating or aggravating circumstances."). The trial court accordingly denied Hurst's request to use such a form. JA307.

Nor does the jury's seven-to-five vote recommending death support an inference that a majority of jurors found any one aggravator. Although the jurors were instructed that they could recommend death only if they "determine[d] that at least one aggravating circumstance is found to exist," JA215, they were presented with two aggravating circumstances, JA211-212. And "[n]othing in [Florida law] ... requires a majority of the jury to agree on *which* aggravating circumstances exist." *Steele*, 921 So. 2d at 545. It is entirely possible that as few as four jurors found one aggravator and three found the other, and thus that each aggravator was rejected by at least two-thirds of the jurors. *See id.* (observing that Florida permits this precise scenario); *see Sochor* v. *Florida*, 504 U.S. 527, 538 (1992) ("Because the jury in Florida does not reveal the aggravating factors on which it relies, we cannot know whether this jury actually relied on [a particular] factor.").[11] The advisory verdict's inherent indeterminacy with respect to aggravators—which will exist in every capital case in Florida except where the jury is presented with only one aggravator *and* votes to recommend a death sentence—precludes the advisory verdict from bringing Hurst's sentence into line with the Sixth Amendment under *Ring* because it cannot be said that the jury has actually found a fact necessary to authorize the sentence.

---

[11] The jury's earlier verdict convicting Hurst of first-degree murder also does not imply that the jury found facts sufficient to establish any particular aggravator. *Supra* p. 5.

2. In any event, implicit factual findings—whether determinate or indeterminate—cannot cure Florida's *Ring* violation because, as discussed, under Florida law it is the court's findings alone, not the jury's verdict or any findings implied by that verdict, that authorizes the death sentence.

The State's contrary argument (Opp. 15) rests on this Court's remark in *Jones* v. *United States* that the unanimous jury in *Hildwin* "made a sentencing recommendation of death, thus necessarily engaging in the factfinding required for imposition of a higher sentence, that is, the determination that at least one aggravating factor had been proved." 526 U.S. 227, 250-251 (1999). But *Jones* does not express the Court's considered, authoritative judgment about the constitutionality of Florida's capital sentencing scheme in general or of a death sentence after a jury recommendation of death in particular. In *Jones*, the Court addressed the Sixth Amendment to ascertain whether one proposed interpretation of the federal statute before it "would raise serious constitutional questions" that could be avoided by adopting a different interpretation. *See* 526 U.S. at 250-252. The Court did not decide what the Constitution actually requires. *Id.* In addition, *Jones* was decided before *Ring* and *Apprendi*, at a time when the Court was still "endeavor[ing] to distinguish certain capital sentencing decisions, including *Walton*," without confronting the Sixth Amendment issues it ultimately resolved in *Ring*. *Ring*, 536 U.S. at 600-603.

Ring has since made clear that even if the jury's advisory sentence recommending death implied that the jury here had found at least one aggravator—and as discussed above, it does not—Hurst's sentence would not comport with the Sixth Amendment. Just as in *Ring*, the jury's recommendation of death here did

not authorize a death sentence. "Based solely on the jury's verdict"—whether its guilty verdict, its advisory verdict recommending death, or both—"the maximum punishment [Hurst] could have received was life imprisonment." *Ring*, 536 U.S. at 597. "This was so because"—as discussed above—in Florida, as in Arizona at the time of *Ring*, "a death sentence may not legally be imposed ... unless at least one aggravating factor is found to exist beyond a reasonable doubt" by the trial court. *Id.*; *Blakely*, 542 U.S. at 304 ("When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts which the law makes essential to the punishment, and the judge exceeds his proper authority." (quotation marks and citation omitted)). Florida bars the use of a special verdict form for capital sentencing precisely because "requiring specific jury findings on aggravators without guidance about their effect on the imposition of a sentence could ... harm[] the trial court's independent determination of the existence of the aggravating and mitigating circumstances." *Franklin* v. *State*, 965 So. 2d 79, 102 (Fla. 2007) (quotation marks omitted). The State's "implicit findings" theory therefore fails.

III. If The Jury's Advisory Verdict Implied The Finding Required By *Ring*, Hurst's Sentence Would Violate The Constitution For Other Reasons

If, contrary to the arguments above, the State were correct that the jury's advisory verdict satisfied *Ring* on the theory that the jury implicitly made the findings of fact necessary to authorize imposition of the death sentence, Hurst's sentence still could not be sustained. Florida law imposes constraints that would scuttle the jury's function as responsible factfinder and bulwark of the community's judgment.

A. Hurst's Sentence Would Violate The Eighth Amendment Because It Would Have Been Based On Jury Instructions That Misleadingly Minimized The Jury's Sense Of Responsibility

If the jury's advisory verdict implied the finding necessary to satisfy *Ring*, then Hurst's sentence would violate the Eighth Amendment because the jury instructions would have misleadingly "minimize[d] the jury's sense of responsibility for determining the appropriateness of death." *Caldwell* v. *Mississippi*, 472 U.S. 320, 341 (1985); *see also Romano* v. *Oklahoma*, 512 U.S. 1, 8 (1994). Under the Eighth Amendment, "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Caldwell*, 472 U.S. at 328-329; *see also id.* at 342 (O'Connor, J., concurring) ("[T]he prosecutor's remarks were impermissible because they were inaccurate and misleading in a manner that diminished the jury's sense of responsibility.").

Here, the jury was instructed that its sentencing verdict would be purely advisory and that responsibility for determining whether Hurst should be sentenced to death rested with the trial court. Before the jurors retired to deliberate, the trial court told them that theirs would be "an advisory sentence," and that, although their recommendation "must be given great weight," "the final decision as to which punishment shall be imposed is the responsibility of the judge." JA207-208. Nowhere did the court instruct the jury that its verdict would constrain the court's sentencing deliberation, let alone control it. Nowhere did the court instruct that the jury's recommendation alone was

sufficient to authorize the court to impose the death sentence by (implicitly) finding at least one aggravating circumstance. And nowhere did the court instruct that the jury's finding of an aggravator was necessary for the imposition of a capital sentence.

The Florida Supreme Court has acknowledged this Eighth Amendment concern. In *Combs*, the court rejected a *Caldwell* objection to Florida's standard jury instructions—which have remained substantially the same as the instructions given here, *see* 525 So. 2d at 856-857—but did so only because the jury's sentence was "only advisory," such that the instructions were not misleading. *Id.* In doing so, the court acknowledged that if the jury's verdict were *not* merely advisory, then the court "would necessarily have to find that [Florida's] standard jury instructions, as they have existed since 1976, violate the dictates of *Caldwell*," thereby requiring "a resentencing proceeding for virtually every individual sentenced to death in this state since 1976." *Id.* at 858 (quotation marks omitted).

B. Hurst's Sentence Would Violate The Sixth And Eighth Amendments Because The Jury's Supposed Implied Finding May Have Been Made By Only A Simple Majority

In addition, if the jury's recommendation implied a factual finding as to aggravating circumstances that authorized imposition of the death penalty, that finding would not satisfy the Sixth and Eighth Amendments because no inference can be drawn from the jury's recommendation that more than seven jurors found an aggravator. JA215-217. This Court has never accepted that an element of a serious crime—which is how aggravators must be viewed for Sixth Amendment purposes under *Ring*, *supra* p. 19—can be found by a sim-

ple-majority verdict. It should not do so now, and it should especially not do so in a capital case. Florida's simple-majority rule contravenes centuries of jurisprudential history recognizing unanimous verdicts as the norm in criminal cases. It stands as the lone outlier against the uniform position of the federal system and 49 other States—in capital and non-capital offenses alike. It lacks the safeguards of fairness that are secured by more demanding voting rules, which find support in social science addressing the unanimity requirement. And it contradicts Florida's own judgment that unanimity is necessary for all jury findings of guilt.

1. The Sixth and Fourteenth Amendments forbid simple-majority jury verdicts

Allowing the aggravating circumstances that make a defendant eligible for a death sentence to be established by a simple-majority vote violates the right to a jury trial secured by the Sixth and Fourteenth Amendments.

1. This Court has never approved a simple-majority rule for jury verdicts in criminal cases. The guarantee of a jury trial "reflect[s] ... a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges." *Duncan*, 391 U.S. at 156. As this Court has emphasized, by "[p]roviding an accused with the right to be tried by a jury of his peers," the Framers "gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." *Id.*

The Sixth and Fourteenth Amendments fulfill these purposes in slightly different ways in federal and state cases, respectively. In federal cases, the Sixth

Amendment requires that all convictions for non-petty offenses be by a unanimous jury verdict. *Andres*, 333 U.S. at 748-749; *Hawaii* v. *Mankichi*, 190 U.S. 197, 211-212 (1903). Thus, Hurst's sentence could not constitutionally have been imposed in federal court. *Ring* requires that "the aggravating circumstances necessary for the imposition of the death penalty" be found by the jury, 536 U.S. at 609; but Florida does not require unanimity for aggravators, and the jury here was instructed accordingly, JA215-217.

The standard is somewhat different—but no more tolerant of a simple-majority rule—in state cases. This distinction results from the Court's splintered ruling in *Apodaca* v. *Oregon*, 406 U.S. 404 (1972), involving Oregon's "ten of twelve" rule. In *Apodaca*, eight Justices agreed that the right to a jury trial "applied identically" in federal and state cases. *McDonald* v. *City of Chicago*, 561 U.S. 742, 766 n.14 (2010) (plurality) (citing *Johnson* v. *Louisiana*, 406 U.S. 356, 395 (1972) (Brennan, J., dissenting in *Apodaca*)). But because those eight Justices were evenly divided on whether the Sixth Amendment required unanimity, Justice Powell's separate concurrence broke the tie, and he concluded that the Sixth Amendment requires unanimity in federal cases, but that Oregon's "ten of twelve" rule passed muster under the Fourteenth Amendment. *Id.*; *Johnson*, 406 U.S. at 369-380 (Powell, J., concurring in the judgment in *Apodaca*); *id.* at 381-382 (Douglas, J., dissenting); *Apodaca*, 406 U.S. at 406 (plurality); *id.* at 414-415 (Stewart, J., dissenting). As a result, the per se unanimity requirement applicable in federal cases does not extend fully to the States. But the States are still prohibited from altering their jury systems—including their voting rules—in a way that threatens the "jury's essential feature": "the 'interposition between the

accused and his accuser of the commonsense judgment of a group of laymen'" and "'the community participation and shared responsibility that results from that group's determination of guilt or innocence.'" *Burch* v. *Louisiana*, 441 U.S. 130, 135 (1979).

Apodaca itself casts serious doubt on a simple-majority rule. While a majority of the *Apodaca* Court declined to recognize an across-the-board unanimity requirement in state cases, another (overlapping) majority made clear that a simple-majority rule would, at a minimum, raise great constitutional concerns. *See Apodaca*, 406 U.S. at 414 (Stewart, J., joined by Brennan, J., and Marshall, J., dissenting) (unanimity required in state court); *Johnson*, 406 U.S. at 380-381 (Douglas, J., joined by Brennan, J., and Marshall, J.) (same); *Johnson*, 406 U.S. at 415 (Blackmun, J., concurring in *Apodaca*) ("a system employing a 7-5 standard, rather than a 9-3 or 75% minimum, would afford me great difficulty"). And Justice Powell recognized that "[a]pproval of Oregon's 10-2 requirement does not compel acceptance of all other majority-verdict alternatives." *Johnson*, 406 U.S. at 377 n.21 (Powell, J., concurring in the judgment in *Apodaca*). With four Justices believing a simple-majority rule unconstitutional, one Justice expressing "great difficulty," and another Justice disclaiming any approval, *Apodaca* lends no support to Florida's simple-majority rule.

2. Each of the factors this Court considers in the Sixth Amendment context—history, current practice, and functional considerations, *e.g.*, *Apprendi*, 530 U.S. at 478-484; *Burch*, 441 U.S. at 138-139—confirms that a simple-majority rule is inadequate to fulfill the jury trial's fundamental purposes.

By the eighteenth century, it was well-established that a guilty verdict in criminal cases required a unanimous jury. Sir William Blackstone explained that "the trial by jury ... is the most transcendent privilege which any subject can enjoy, or wish for, that he cannot be affected either in his property, his liberty, or his person, but by the unanimous consent of twelve of his neighbours and equals." 3 Blackstone, *Commentaries on the Laws of England* 379 (1768); *see also* 4 Blackstone, *Commentaries on the Laws of England* 343 (1769) ("[T]he truth of every accusation ... should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours," *quoted in Apprendi*, 530 U.S. at 477). Similarly, John Adams wrote in 1786 that "it is the unanimity of the jury that preserves the rights of mankind." 1 Adams, *A Defence of the Constitutions of Government of the United States of America* 376 (3d ed. 1797). Justice Wilson concurred in his lectures in 1790-1791: "To the conviction of a crime, the undoubting and the unanimous sentiment of the twelve jurors is of indispensable necessity." 2 Wilson, *The Works of the Honourable James Wilson, L.L.D.* 350 (1804). And James Madison's draft of the Sixth Amendment explicitly provided for the right to trial "by an impartial jury of freeholders of the vicinage, with the requisite of unanimity for conviction, of the right of challenge, and other accustomed requisites." 1 Annals of Cong. 452 (1789).[12]

---

[12] Whether Madison's inclusion of "unanimity" alongside the "other accustomed requisites" of the jury-trial right shows that Congress intended to constitutionalize a unanimity requirement in the Sixth Amendment may be debated in light of Congress's amendment of Madison's draft. *See Apodaca*, 406 U.S. at 409-410 (plurality). But, at a minimum, Madison's draft confirms that, at the time of the Founding, more than a bare majority was required.

In the early nineteenth century, Justice Story similarly observed that, in criminal cases, "unanimity in the verdict of the jury is indispensable." 3 Story, *Commentaries on the Constitution of the United States* § 777, at 248 (1833). And unanimity—not a bare-majority rule—continued to define the contours of the right to a jury trial at the time of the Fourteenth Amendment's ratification. *See, e.g.*, Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 320 (1868) ("The jury must unanimously concur in the verdict."); 1 Bishop, *Commentaries on the Law of Criminal Procedure* 532 (1866) (statute authorizing a verdict "upon anything short of the unanimous consent of the twelve jurors" is "void"); Tiffany, *A Treatise on Government, and Constitutional Law* 367 (1867) ("[T]rial by jury is understood to mean—generally—trial by a jury of twelve men, impartially selected, and who must unanimously concur in the guilt of the accused before a legal conviction can be had."); Proffatt, *A Treatise on Trial by Jury* 119 (1880) ("[I]t is required that th[e] jury shall be unanimous.").

The "current jury practices of the several States" establish that a simple-majority rule is an aberration by contemporary standards as well. *Burch*, 441 U.S. at 138. No State, except Florida, applies a simple-majority verdict rule with respect to the elements of *any* serious (*i.e.*, non-petty) crime—much less for capital cases.[13] The federal system and all States but two—Oregon and Louisiana—require unanimity to convict a defendant of

---

[13] The Sixth Amendment right to trial by jury applies to "non-petty" offenses—*i.e.*, those where imprisonment for more than six months is authorized. *Baldwin* v. *New York*, 399 U.S. 66, 68-69 (1970).

any non-petty offense.[14] The two outliers deviate from unanimity only to the extent of allowing a ten-to-two verdict, and even then only in non-capital cases. In capital cases, both Louisiana and Oregon require unanimity at all stages. La. Const. art. I, § 17(A); La. Code Crim. P. Ann. art. 782(A); Or. Const. art. I, § 11.

---

[14] *See* Ala. R. Crim. P. 23.1(a); Alaska R. Crim. P. 31(a); Ariz. Const. art. II, § 23; Ark. Code Ann. § 16-89-126(a), 128; Cal. Const. art. I, § 16; *People* v. *Russo*, 25 P.3d 641, 645 (Cal. 2001); Colo. Rev. Stat. Ann. § 16-10-108; Colo. R. Crim. P. 31(a)(3); Conn. Super. Ct. R. Crim. P. § 42-29; Del. Super. Ct. R. Crim. P. 31(a); Fla. R. Crim. P. 3.440; *Ball* v. *State*, 70 S.E. 888 (Ga. Ct. App. 1911); *State* v. *Arceo*, 928 P.2d 843, 872 (Haw. 1996); Idaho Crim. Ct. R. 31(a); Idaho Code Ann. §§ 19-2316, 2317; 725 Ill. Comp. Stat. 5/115-4(o); Ind. St. Ct. Jury R. 16(a); *Fisher* v. *State*, 291 N.E. 2d 76, 82 (Ind. 1973); Iowa R. Crim. P. 2.22(5); Kan. Stat. Ann. § 22-3421; Ky. R. Crim. P. 9.82(1); Me. R. Crim. P. 31(a); Md. Const. Decl. of Rights, art. 21; Md. R. 4-327(a); Mass. R. Crim. P. 27(a); Mich. Ct. R. 6.410(B); Minn. R. Crim. P. 26.01, subd. 1(5); Miss. Const. art. 3, § 31; *Fulgham* v. *State*, 46 So. 3d 315, 324 (Miss. 2010); Mo. Const. art. I, sec. 22(a); *State* v. *Celis-Garcia*, 344 S.W.3d 150, 155 (Mo. 2011) (en banc); Mont. Const. art. II, § 26; Neb. Const. art. I, § 6; *State* v. *Hochstein*, 632 N.W.2d 273, 282 (Neb. 2001); Nev. Rev. Stat. § 175.481; N.H. Const. Pt. 1, art. 15; *State* v. *Dushame*, 616 A.2d 469, 472 (N.H. 1992); N.J. Ct. R. 1:8-9; N.M. R. Crim. P. 5-611(A); N.Y. Const. art. I, § 2; *People* v. *DeCillis*, 199 N.E.2d 380, 381 (N.Y. 1964); N.C. Const. art. I, § 24; N.C. Gen. Stat. § 15A-1201-(a); N.D. Const. art. I, § 13; Ohio R. Crim. P. 31(A); Okla. Const. art. II, § 19; Pa. R. Crim. P. 648(B); R.I. Super. R. Crim. P. 31(a); *State* v. *Logue*, 28 S.E.2d 788, 791 (S.C. 1944); S.D. Codified Laws § 23A-26-1; Tenn. R. Crim. P. 31(a); Tex. Code Crim. P. arts. 36.29(a), 37.02, 37.03; Utah Const. art. I, § 10; Utah R. Crim. P. 21(b); Va. Const. art. I, § 8; Va. S. Ct. R. 3A:17(a); Vt. Const. ch. I, art. 10; Vt. R. Crim. P. 31(a); Wash. Super. Ct. Crim. R. § 6.16(a)(2); W. Va. R. Crim. P. 31(a); Wis. Const. art. I, §§ 5, 7; *Holland* v. *State*, 280 N.W.2d 288, 290 (Wis. 1979); Wyo. Stat. § 7-11-501. Fed. R. Crim. P. 31(a). The Uniform Code of Military Justice requires a unanimous verdict for capital crimes; a two-thirds majority is required for all other offenses. 10 U.S.C. § 852(a); R. for Courts-Martial 1004(a)(2).

The consensus is even stronger with respect to findings that make a defendant eligible for the death penalty. The federal system and all other States that retain the death penalty require that such findings be made by a unanimous jury. *See Steele*, 921 So. 2d at 548-549 & nn.3-5.[15] The Florida Supreme Court itself has recognized that Florida is now "the outlier state." *Id.* at 550.

The American system's rejection of simple-majority verdict rules is not just well-established; it is eminently well-founded. This Court has "long been of the view that 'the very object of the jury system is to secure unanimity by a comparison of views, and by arguments among the jurors themselves.'" *Jones* v. *United States*, 527 U.S. 373, 382 (1999) (quoting *Allen* v. *United States*, 164 U.S. 492, 501 (1896)) (brackets omitted). As Justice Kennedy explained when sitting on the court of appeals:

> The dynamics of the jury process are such that often only one or two members express doubt

---

[15] Since *Steele* surveyed the States in 2005, seven States (Connecticut, Illinois, Maryland, Nebraska, New Jersey, New Mexico, and New York) have eliminated the death penalty, bringing the number of capital-punishment States to 31. Further, while *Steele* stated that, in Utah and Virginia, the jury need not necessarily "find *each* aggravator unanimously," 921 So. 2d at 549 (emphasis added), both require unanimity for the aggravators necessary to make the defendant death-eligible. *See Archuleta* v. *Galetka*, 267 P.3d 232, 259 (Utah 2011) ("[T]he fact finder in the guilt phase must find—unanimously and beyond a reasonable doubt—the statutory aggravator that makes death a possible sentence"); *Prieto* v. *Commonwealth*, 682 S.E.2d 910, 935 (Va. 2009) (holding, after *Steele*, that unanimity as to aggravators is required). In both Utah and Virginia, moreover, "the jury must unanimously recommend the death penalty." *Steele*, 921 So. 2d at 549.

> as to [the] view held by a majority at the outset of deliberations. A rule which insists on unanimity furthers the deliberative process by requiring the minority view to be examined and, if possible, accepted or rejected by the entire jury. The requirement of jury unanimity thus has a precise effect on the fact-finding process, one which gives particular significance and conclusiveness to the jury's verdict.

United States v. *Lopez*, 581 F.2d 1338, 1341 (9th Cir. 1978). Non-unanimous voting rules compromise this function—most severely when the voting rule is a simple majority.

Empirical research confirms that concern. According to a 2001 study, "several consistent findings have emerged" in research conducted over the last four decades: Juries not subject to a unanimity requirement "tend to take less time to reach a verdict, take fewer polls, ... hang less often," and most importantly, "cease deliberating when [the minimum necessary vote] is reached." Devine et al., *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 Psychol. Pub. Pol'y & L. 622, 669 (2001) (citations omitted); *see also* Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 Harv. L. Rev. 1261, 1272-1273 (2000) (reporting similar findings); *see also* Jonakait, *The American Jury System* 103 (2003). Most troubling, evidence from jurisdictions that do require unanimity—thus forcing jurors to continue deliberating—shows that prolonged deliberations affect outcomes. According to one study, when unanimity is required, "a simple majority of seven votes for death on the first ballot almost invariably portends ... that eventually a life sentence will emerge from the jury room." Sundby, *War*

and Peace in the Jury Room: How Capital Juries Reach Unanimity, 62 Hastings L.J. 103, 107-108 (2010).

This case exemplifies the extent to which a simple-majority rule can undermine the "'community participation'" and "'shared responsibility'" in the verdict that underpin the right to a jury trial. *Burch*, 441 U.S. at 135. After four days of testimony, and despite the gravity of their task, the jurors spent less than two hours in the jury room before recommending that Hurst be sentenced to death by the slightest of margins. JA24-25.

3. Because this Court has never considered the constitutionality of a simple-majority rule under the Sixth Amendment, invalidating Hurst's sentence on this ground would not require revisiting any of this Court's decisions. To the extent the Court views *Apodaca*'s upholding of Oregon's "ten of twelve" rule as necessarily approving a seven-to-five rule, however, it should overturn it.

Apodaca was wrong when it was decided. Justice Powell's tie-breaking concurrence rested on the notion that the Fourteenth Amendment did not incorporate "'jot-for-jot and case-for-case'" every element of the Sixth Amendment's right to a jury trial. *Johnson*, 406 U.S. at 375 (Powell, J., concurring in the judgment in *Apodaca*). But, as both the dissenters and Justice Powell himself recognized, this Court had already rejected the proposition that the Fourteenth Amendment incorporated only a "watered-down version of [Bill of Rights] guarantees." *Id.* at 384 (Douglas, J., dissenting in *Apodaca*); *see also Apodaca*, 406 U.S. at 414 (Stewart, J., dissenting) (same); *Johnson*, 406 U.S. at 375 (Powell, J., concurring in the judgment in *Apodaca*) (acknowledging the "course of constitutional interpretation" upon which

the Court "ha[d] embarked" in prior cases). *Stare decisis* considerations are weakened where the relevant precedent is "inconsistent with earlier Supreme Court precedent." *United States* v. *Dixon*, 509 U.S. 688, 704 (1993).

Since *Apodaca*, moreover, this Court has rejected Justice Powell's "watered down" notion of incorporation. In *McDonald*, a plurality of this Court confirmed that "incorporated Bill of Rights protections 'are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.'" 561 U.S. at 765. Writing separately, Justice Thomas also concluded that the Fourteenth Amendment makes applicable against the States all the "individual rights enumerated in the Constitution." *Id.* at 823 (Thomas, J., concurring). *Apodaca* thus stands out as an "exception" that can only be explained as "the result of an unusual division among the Justices." *Id.* at 766 n.14 (plurality). "*[S]tare decisis* does not compel adherence to a decision whose 'underpinnings' have been 'eroded' by subsequent developments of constitutional law." *Alleyne*, 133 S. Ct. at 2164 (Sotomayor, J., concurring) (quoting *Gaudin*, 515 U.S. at 521).[16]

In sum, *stare decisis* considerations do not warrant adhering to *Apodaca*, which was incorrect when decided

---

[16] The factual premise of *Apodaca*'s ruling has also been discredited by the empirical research, discussed above, showing that unanimity is instrumental to preserving the traditional jury function. *See supra* pp. 44-45. Moreover, while Justice Powell relied upon the position of the American Bar Association at the time as support for his conclusion, the ABA has long since reconsidered and abandoned that position in favor of unanimity. *See* ABA, *Standards of Judicial Administration Relating to Trial Courts* Standard 2.10 (1992).

and has been undermined by subsequent developments. They especially cannot do so here, where, in addition, "a majority of the Court expressly disagreed with the rationale of the plurality" at the time of the decision, *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 66 (1996), and the decision involves "procedural rules that implicate ... fundamental constitutional protections"—an area where "[t]he force of *stare decisis* is at its nadir." *Alleyne*, 133 S. Ct. at 2163 n.5.

2. The Eighth and Fourteenth Amendments forbid Florida's simple-majority rule in capital cases

Even if a simple majority were permissible for jury verdicts in non-capital cases, it is prohibited by the Eighth and Fourteenth Amendments in capital cases because it "'risks erroneous imposition of the death sentence.'" *Mills* v. *Maryland*, 486 U.S. 367, 375 (1988).

This Court has held that "there is a significant constitutional difference between the death penalty and lesser punishments," *Beck* v. *Alabama*, 447 U.S. 625, 637 (1980):

> "Death is a different kind of punishment from any other which may be imposed in this country. ... From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action."

Id. at 637-638 (quoting *Gardner* v. *Florida*, 430 U.S. 349, 357-358 (1977) (opinion of Stevens, J.)) (brackets omitted); *see also, e.g.*, *Gregg*, 428 U.S. at 181-188 (joint opinion); *id.* at 231-241 (Marshall, J., dissenting);

Woodson, 428 U.S. at 305 (joint opinion). It is therefore "'of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.'" *Beck*, 447 U.S. at 637-638.

To that end, this Court has repeatedly invalidated under the Eighth and Fourteenth Amendments "procedural rules that tended to diminish the reliability of the sentencing determination." *Beck*, 447 U.S. at 638 (quotation marks omitted); *see, e.g.*, *Woodson*, 428 U.S. at 301-305 (joint opinion) (States may not impose mandatory death sentences); *Roberts* v. *Louisiana*, 428 U.S. 325, 335-336 (1976) (joint opinion) (same); *Beck*, 447 U.S. at 638-646 (States must permit juries to consider lesser-included non-capital offense); *Lockett* v. *Ohio*, 438 U.S. 586, 604 (1978) (plurality) (States may not constrain sentencer's consideration of relevant mitigating circumstances); *Eddings*, 455 U.S. at 117 (similar).

History and the "'evolving standards of decency,'" *Hall* v. *Florida*, 134 S. Ct. 1986, 1992 (2014)—as evidenced by current practice and independent judgment, *see id.* at 1996-2001—demonstrate that Florida's simple-majority rule is too unreliable to establish the factual predicate for a death sentence.

First, the rule that a death sentence requires a unanimous jury verdict as to all necessary factual predicates—including all aggravating circumstances—has "impressive historical credentials." *Ford* v. *Wainwright*, 477 U.S. 399, 406 (1986). English and American history establishes that convictions in criminal cases traditionally required a unanimous verdict by the jury. *See supra* pp. 40-41. This right to a unanimous verdict, moreover, necessarily extended to all facts necessary to impose the death penalty because, at least throughout

the eighteenth and nineteenth centuries, all factfinding—with respect to both guilt and capital sentencing—remained the exclusive province of the jury. *See Apprendi*, 530 U.S. at 479; *Woodson*, 428 U.S. at 289-291; *McGautha*, 402 U.S. at 197-198; *supra* pp. 27-28. A death sentence founded on non-unanimous factual findings would have been unknown to the Framers of the Eighth and Fourteenth Amendments alike.

Second, this Court has "pinpointed that the 'clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.'" *Atkins* v. *Virginia*, 536 U.S. 304, 312 (2002).[17] On the question of jury unanimity, the legislatures' consensus is overwhelming: All States that retain the death penalty other than Florida, as well as the federal system, require that a jury establish the eligibility for a death sentence by unanimous verdict. *Supra* p. 43. Florida's outlier status is "strong evidence of consensus that our society does not regard" imposing death based on a simple-majority vote as "proper or humane." *Hall*, 134 S. Ct. at 1998.

Third, independent judgment confirms the impropriety of a simple-majority rule for aggravating circumstances in capital cases. As already explained, this Court's precedent has long recognized the critical purpose served by jurors' "comparison of views" and "arguments among ... themselves.'" *Jones*, 527 U.S. at 382; *see also McKoy* v. *North Carolina*, 494 U.S. 433, 452 (1990) (Kennedy, J., concurring) ("Jury unanimity

---

[17] This Court has considered such consensus as an important component of Eighth Amendment analysis in cases challenging the procedure for selecting the sentence, as well as in cases where the propriety of capital punishment was substantively in issue. *E.g.*, *Woodson*, 428 U.S. at 294 (joint opinion); *Hall*, 134 S. Ct. at 1996-1998.

... is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community."); *supra* pp. 43-44. This conclusion, moreover, is confirmed by empirical research indicating that juries not subject to a unanimity requirement engage in less meaningful deliberation and often end deliberations altogether as soon as the minimum necessary vote is reached. *Supra* pp. 44-45; *cf. Hall*, 134 S. Ct. at 2000 (independent judgment "is informed by the views of medical experts").[18]

Finally, Florida's own adherence to a unanimity requirement in all other criminal contexts renders its adoption of the looser simple-majority rule in capital sentencing "arbitrary and capricious." *Gregg*, 428 U.S. at 188 (joint opinion). This Court often views intrajurisdictional inconsistencies as relevant under the Eighth Amendment. *See, e.g., Beck*, 447 U.S. at 636-637 (invalidating Alabama's failure to instruct capital juries on lesser-included offenses and noting that "Alabama itself gives the defendant a right to such instructions under appropriate circumstances"); *Graham* v. *Florida*, 560 U.S. 48, 60 (2010) (explaining when courts should "compare the defendant's sentence with the sentences received by other offenders in the same jurisdiction"); *id.* at 88 (Roberts, C.J., concurring) (citing "'intrajurisdictional' comparison of the sentence at issue" in

---

[18] That the Eighth Amendment prohibits a unanimity requirement for *mitigating* circumstances does not alter this analysis. *See McKoy*, 494 U.S. at 443; *Mills*, 486 U.S. at 373-374. Requiring different voting rules for aggravating and mitigating circumstances makes sense because mitigating circumstances, unlike aggravators, are not factual prerequisites for imposing the death penalty and do not increase—but generally decrease—the risk that the death penalty will be imposed.

proportionality analysis); *Harmelin* v. *Michigan*, 501 U.S. 957, 1005 (1991) (Kennedy, J., concurring) (same).

Here, despite the uniquely grave context of capital sentencing, Florida's simple-majority rule for capital sentencing is inexplicably *less* demanding than the voting rule Florida applies in all other criminal proceedings. Florida law is clear that "[n]o verdict may be rendered unless *all* of the trial jurors concur in it." Fla. R. Crim. P. 3.440 (emphasis added); *see also Bottoson* v. *Moore*, 833 So. 2d 693, 714 (Fla. 2002) (Shaw, J., concurring) (unanimity requirement "has been an inviolate tenet of Florida jurisprudence since the State was created"); *Motion to Call Circuit Judge to Bench*, 8 Fla. 459, 482 (1859) ("The common law wisely requires the verdict of a petit jury to be unanimous."). This unanimity requirement, moreover, applies to all criminal cases in which a jury is empaneled—a broad swath that even includes many misdemeanors. *See, e.g.*, *Rodriguez Sanchez* v. *State*, 503 So. 2d 436, 437 (Fla. Dist. Ct. App. 1987) (jury unanimity required when defendant charged with misdemeanor "for the alleged theft of a blouse having a value of less than one hundred dollars").

"The decision to exercise the power of the State to execute a defendant is unlike any other decision citizens and public officials are called upon to make. Evolving standards of societal decency have imposed a correspondingly high requirement of reliability on the determination that death is the appropriate penalty in a particular case." *Mills*, 486 U.S. at 383-384. Under Florida law, however, the jury's decision "on a matter so grave as the determination of whether a human life should be taken," *Gregg*, 428 U.S. at 189 (1976) (joint opinion), requires only a majority vote. A Florida jury must deliberate until it reaches unanimity to convict a defendant for stealing a blouse, but can recommend a

defendant's execution without seeking any consensus as to aggravators beyond a simple majority. The Eighth Amendment cannot abide such an anomalous, attenuated standard of reliability.

C. Hurst's Sentence Would Be Unconstitutional Because The Aggregate Effect Of The Defects In Florida's Capital Sentencing Scheme Subverts The Jury's Deliberative Function

Even if the many defects identified above could be tolerated in isolation, they certainly cannot be tolerated in combination. The "essential feature" of the jury trial is the "'interposition between the accused and his accuser of the commonsense judgment of a group of laymen'" and the assurance of "'community participation and shared responsibility'" in and for the verdict. *Burch*, 441 U.S. at 135. A jury can serve these ends only if its procedures promote adequate "group deliberation" and responsible factfinding. *Id.* Here, Florida law relegates the jury to a purely advisory role in violation of *Ring*. But if, as the State suggests, no *Ring* violation arose because the jury in fact made implicit findings that authorized Hurst's death sentence, the State would have to confront the fact that in making those implicit findings, the jury operated under constraints that combined to render its deliberations hollow.

As this Court has recognized, procedures that undermine adequate group deliberation are constitutionally invalid whether they do so in isolation or collectively. In *Burch*, this Court invalidated Louisiana's practice allowing convictions by a vote of five out of six jurors. The Court had previously held that jury size could be reduced to six, *Williams* v. *Florida*, 399 U.S. 78 (1970), and had previously upheld a less-than-unanimous ten-to-two voting rule, *Apodaca*, 406 U.S. at

411; *see also Johnson*, 406 U.S. at 364-365 (nine-to-three rule does not violate Due Process Clause). But Louisiana's "five of six" practice at issue in *Burch* arose "at the intersection of [the Court's] decisions concerning jury size and unanimity." *Burch*, 441 U.S. at 137. The Court accordingly focused on the aggregate effects on the function of the jury of Louisiana's reduced jury size and relaxed decision rule. *Id.* at 138-139. The Court concluded:

> [W]hen a State has reduced the size of its juries to the minimum number of jurors permitted by the Constitution, the additional authorization of nonunanimous verdicts by such juries sufficiently threatens the constitutional principles that led to the establishment of the size threshold that any countervailing interest of the State should yield.

Id. at 139. Together, Louisiana's practices did "not permit the jury to function in the manner required by" the Constitution, but "threatened the fairness of the proceeding and the proper role of the jury." *Id.* at 137-138.

Similar logic applies here. Even if the various aspects of Florida's capital sentencing scheme identified above could be constitutional in isolation, Hurst's sentence would still be invalid because their aggregate effect undermines any confidence in the quality of the jury's deliberations. Assume that, despite *Caldwell*, a jury may be misled to believe that its (implied) finding of an aggravator is merely "advisory" when in fact it is critical to the availability of the death sentence. Assume that, despite the views of a majority of this Court in *Apodaca* and every State's practice with respect to non-aggravator elements of non-petty crimes, a jury may find an aggravator by a simple majority. Assume,

finally, that despite *Ring*, the jury need not even agree on which aggravator exists—so that as few as four jurors may find one of the presented aggravators while three jurors find the other aggravator. At a minimum, the aggregate effect of these procedures would prevent the jury from conducting the meaningful deliberation required by the Constitution. Hurst's sentence thus cannot be sustained.

CONCLUSION

The Florida Supreme Court's judgment should be reversed and Hurst's sentence should be vacated.

Respectfully submitted.

NANCY A. DANIELS
PUBLIC DEFENDER
DAVID A. DAVIS
ASSISTANT PUBLIC DEFENDER
Leon County Courthouse
301 South Monroe Street
Suite 401
Tallahassee, FL 32301

MARK E. OLIVE
LAW OFFICES OF MARK E. OLIVE, P.A.
320 West Jefferson Street
Tallahassee, FL 32301

SETH P. WAXMAN
Counsel of Record
CATHERINE M.A. CARROLL
DAVID M. LEHN
FRANCESCO VALENTINI
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
seth.waxman@wilmerhale.com

ERIC F. FLETCHER
ALLISON TRZOP
WILMER CUTLER PICKERING HALE AND DORR LLP
60 State Street
Boston, MA 02109

MAY 2015

APPENDIX

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. Const. amend. VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Fla. Stat. § 775.082. Penalties; applicability of sentencing structures; mandatory minimum sentences for certain reoffenders previously released from prison

Effective: July 1, 2011 to June 30, 2014

(1) A person who has been convicted of a capital felony shall be punished by death if the proceeding held to determine sentence according to the procedure set forth in s. 921.141 results in findings by the court that such person shall be punished by death, otherwise such person shall be punished by life imprisonment and shall be ineligible for parole.

(2) In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death for a capital felony shall cause such person to be brought before the court, and the court shall sentence such person to life imprisonment as provided in subsection (1). No sentence of death shall be reduced as a result of a determination that a method of execution is held to be unconstitutional under the State Constitution or the Constitution of the United States.

(3) A person who has been convicted of any other designated felony may be punished as follows:

(a) 1. For a life felony committed prior to October 1, 1983, by a term of imprisonment for life or for a term of years not less than 30.

2. For a life felony committed on or after October 1, 1983, by a term of imprisonment for life or by a term of imprisonment not exceeding 40 years.

3. Except as provided in subparagraph 4., for a life felony committed on or after July 1, 1995, by a term of imprisonment for life or by imprisonment for a term of years not exceeding life imprisonment.

4. a. Except as provided in sub-subparagraph b., for a life felony committed on or after September 1, 2005, which is a violation of s. 800.04(5)(b), by:

(I) A term of imprisonment for life; or

(II) A split sentence that is a term of not less than 25 years' imprisonment and not exceeding life imprisonment, followed by probation or community control for the remainder of the person's natural life, as provided in s. 948.012(4).

b. For a life felony committed on or after July 1, 2008, which is a person's second or subsequent violation of s. 800.04(5)(b), by a term of imprisonment for life.

(b) For a felony of the first degree, by a term of imprisonment not exceeding 30 years or, when specifically provided by statute, by imprisonment for a term of years not exceeding life imprisonment.

(c) For a felony of the second degree, by a term of imprisonment not exceeding 15 years.

(d) For a felony of the third degree, by a term of imprisonment not exceeding 5 years.

(4) A person who has been convicted of a designated misdemeanor may be sentenced as follows:

(a) For a misdemeanor of the first degree, by a definite term of imprisonment not exceeding 1 year;

(b) For a misdemeanor of the second degree, by a definite term of imprisonment not exceeding 60 days.

(5) Any person who has been convicted of a noncriminal violation may not be sentenced to a term of imprisonment nor to any other punishment more severe than a fine, forfeiture, or other civil penalty, except as provided in chapter 316 or by ordinance of any city or county.

(6) Nothing in this section shall be construed to alter the operation of any statute of this state authorizing a trial court, in its discretion, to impose a sentence of imprisonment for an indeterminate period within minimum and maximum limits as provided by law, except as provided in subsection (1).

(7) This section does not deprive the court of any authority conferred by law to decree a forfeiture of property, suspend or cancel a license, remove a person from

office, or impose any other civil penalty. Such a judgment or order may be included in the sentence.

(8)(a) The sentencing guidelines that were effective October 1, 1983, and any revisions thereto, apply to all felonies, except capital felonies, committed on or after October 1, 1983, and before January 1, 1994, and to all felonies, except capital felonies and life felonies, committed before October 1, 1983, when the defendant affirmatively selects to be sentenced pursuant to such provisions.

(b) The 1994 sentencing guidelines, that were effective January 1, 1994, and any revisions thereto, apply to all felonies, except capital felonies, committed on or after January 1, 1994, and before October 1, 1995.

(c) The 1995 sentencing guidelines that were effective October 1, 1995, and any revisions thereto, apply to all felonies, except capital felonies, committed on or after October 1, 1995, and before October 1, 1998.

(d) The Criminal Punishment Code applies to all felonies, except capital felonies, committed on or after October 1, 1998. Any revision to the Criminal Punishment Code applies to sentencing for all felonies, except capital felonies, committed on or after the effective date of the revision.

(e) Felonies, except capital felonies, with continuing dates of enterprise shall be sentenced under the sentencing guidelines or the Criminal Punishment Code in effect on the beginning date of the criminal activity.

(9)(a) 1. "Prison releasee reoffender" means any defendant who commits, or attempts to commit:

a. Treason;

b. Murder;

c. Manslaughter;

d. Sexual battery;

e. Carjacking;

f. Home-invasion robbery;

g. Robbery;

h. Arson;

i. Kidnapping;

j. Aggravated assault with a deadly weapon;

k. Aggravated battery;

l. Aggravated stalking;

m. Aircraft piracy;

n. Unlawful throwing, placing, or discharging of a destructive device or bomb;

o. Any felony that involves the use or threat of physical force or violence against an individual;

p. Armed burglary;

q. Burglary of a dwelling or burglary of an occupied structure; or

r. Any felony violation of s. 790.07, s. 800.04, s. 827.03, s. 827.071, or s. 847.0135(5);

within 3 years after being released from a state correctional facility operated by the Department of Corrections or a private vendor or within 3 years after being released from a correctional institution of another state, the District of Columbia, the United States, any possession or territory of the United States, or any foreign jurisdiction, following incarceration for an offense for which the sentence is punishable by more than 1 year in this state.

2. "Prison releasee reoffender" also means any defendant who commits or attempts to commit any offense listed in sub-subparagraphs (a)1.a.-r. while the defendant was serving a prison sentence or on escape status from a state correctional facility operated by the Department of Corrections or a private vendor or while the defendant was on escape status from a correctional institution of another state, the District of Columbia, the United States, any possession or territory of the United States, or any foreign jurisdiction, following incarceration for an offense for which the sentence is punishable by more than 1 year in this state.

3. If the state attorney determines that a defendant is a prison releasee reoffender as defined in subparagraph 1., the state attorney may seek to have the court sentence the defendant as a prison releasee reoffender. Upon proof from the state attorney that establishes by a preponderance of the evidence that a defendant is a prison releasee reoffender as defined in this section, such defendant is not eligible for sentencing under the sentencing guidelines and must be sentenced as follows:

a. For a felony punishable by life, by a term of imprisonment for life;

b. For a felony of the first degree, by a term of imprisonment of 30 years;

c. For a felony of the second degree, by a term of imprisonment of 15 years; and

d. For a felony of the third degree, by a term of imprisonment of 5 years.

(b) A person sentenced under paragraph (a) shall be released only by expiration of sentence and shall not be eligible for parole, control release, or any form of early

release. Any person sentenced under paragraph (a) must serve 100 percent of the court-imposed sentence.

(c) Nothing in this subsection shall prevent a court from imposing a greater sentence of incarceration as authorized by law, pursuant to s. 775.084 or any other provision of law.

(d) 1. It is the intent of the Legislature that offenders previously released from prison who meet the criteria in paragraph (a) be punished to the fullest extent of the law and as provided in this subsection, unless the state attorney determines that extenuating circumstances exist which preclude the just prosecution of the offender, including whether the victim recommends that the offender not be sentenced as provided in this subsection.

2. For every case in which the offender meets the criteria in paragraph (a) and does not receive the mandatory minimum prison sentence, the state attorney must explain the sentencing deviation in writing and place such explanation in the case file maintained by the state attorney.

(10) If a defendant is sentenced for an offense committed on or after July 1, 2009, which is a third degree felony but not a forcible felony as defined in s. 776.08, and excluding any third degree felony violation under chapter 810, and if the total sentence points pursuant to s. 921.0024 are 22 points or fewer, the court must sentence the offender to a nonstate prison sanction. However, if the court makes written findings that a nonstate prison sanction could present a danger to the public, the court may sentence the offender to a state correctional facility pursuant to this section.

(11) The purpose of this section is to provide uniform punishment for those crimes made punishable under

this section and, to this end, a reference to this section constitutes a general reference under the doctrine of incorporation by reference.

Fla. Stat. § 921.141. Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence

Effective: October 1, 2010

(1) Separate proceedings on issue of penalty.—Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements.

However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or the defendant's counsel shall be permitted to present argument for or against sentence of death.

(2) Advisory sentence by the jury.—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) Findings in support of sentence of death.—Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the cir-

cumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence within 30 days after the rendition of the judgment and sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

(4) Review of judgment and sentence.—The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida and disposition rendered within 2 years after the filing of a notice of appeal. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) Aggravating circumstances.—Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment or placed on community control or on felony probation.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any: robbery; sexual battery; aggravated child abuse; abuse of an elderly person or disabled adult resulting in great bodily harm, permanent disability, or permanent disfigurement; arson; burglary; kidnapping; aircraft piracy; or unlawful

throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(j) The victim of the capital felony was a law enforcement officer engaged in the performance of his or her official duties.

(k) The victim of the capital felony was an elected or appointed public official engaged in the performance of his or her official duties if the motive for the capital felony was related, in whole or in part, to the victim's official capacity.

(*l*) The victim of the capital felony was a person less than 12 years of age.

(m) The victim of the capital felony was particularly vulnerable due to advanced age or disability, or because the defendant stood in a position of familial or custodial authority over the victim.

(n) The capital felony was committed by a criminal gang member, as defined in s. 874.03.

(o) The capital felony was committed by a person designated as a sexual predator pursuant to s. 775.21 or a person previously designated as a sexual predator who had the sexual predator designation removed.

(p) The capital felony was committed by a person subject to an injunction issued pursuant to s. 741.30 or s. 784.046, or a foreign protection order accorded full faith and credit pursuant to s. 741.315, and was committed against the petitioner who obtained the injunction or protection order or any spouse, child, sibling, or parent of the petitioner.

(6) Mitigating circumstances.—Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his or her participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

(h) The existence of any other factors in the defendant's background that would mitigate against imposition of the death penalty.

(7) Victim impact evidence.—Once the prosecution has provided evidence of the existence of one or more aggravating circumstances as described in subsection (5), the prosecution may introduce, and subsequently argue, victim impact evidence to the jury. Such evidence shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death. Characterizations and opinions about the crime, the defendant, and the appropriate sentence shall not be permitted as a part of victim impact evidence.

(8) Applicability.—This section does not apply to a person convicted or adjudicated guilty of a capital drug trafficking felony under s. 893.135.

Supreme Court, U.S.
FILED
JUL 29 2015
OFFICE OF THE CLERK

No. 14-7505

In the Supreme Court of the United States

TIMOTHY LEE HURST,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

On Writ of Certiorari to the
Florida Supreme Court

BRIEF FOR RESPONDENT

PAMELA JO BONDI
Attorney General of Florida

ALLEN WINSOR
Solicitor General
Counsel of Record
DENISE HARLE
RACHEL NORDBY
OSVALDO VAZQUEZ
Deputy Solicitors General

CAROLYN M. SNURKOWSKI
Associate Deputy
Attorney General

Office of the
Attorney General
PL-01, The Capitol
Tallahassee, Florida
32399

allen.winsor@myfloridalegal.com
(850) 414-3300

QUESTION PRESENTED

Whether Florida's death sentencing scheme violates the Sixth Amendment or the Eighth Amendment in light of this Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002).

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

INTRODUCTION 1

STATEMENT 2

A. Timothy Lee Hurst's Crime 2

B. Florida's Death Sentencing Framework 4

C. Procedural History 7

SUMMARY OF THE ARGUMENT 12

ARGUMENT 14

I. Florida's Capital Sentencing Framework Complies with *Ring* and *Apprendi*'s Narrow Rule 15

A. Ring *Requires Only that Facts Necessary to Increase the Maximum Sentence Be Found by a Jury or Admitted by the Defendant.* 16

B. *The Eligibility Finding* Ring *Requires Need Not Be Determined at the Penalty Phase.* 19

C. *Neither* Ring *nor Any Constitutional Provision Precludes Additional Judge Findings Once a Defendant Is Death Eligible.* 21

D. *Neither* Ring *nor Any Constitutional Provision Requires Jury Sentencing.* 27

II. Hurst's Sentence Complied with the Sixth and Eighth Amendments in Light of *Ring*.....39

A. *Hurst Conceded the Existence of Aggravating Circumstances.* 41

B. *A Jury Found Beyond a Reasonable Doubt the Existence of an Aggravator.* 44

C. *The Sentence Was Not Otherwise Unconstitutional.*.....48

CONCLUSION.....59

TABLE OF AUTHORITIES

Cases

Alleyne v. United States,
133 S. Ct. 2151 (2013) 17, 23

Apodaca v. Oregon,
406 U.S. 404 (1972) ..... passim

Apprendi v. New Jersey,
530 U.S. 466 (2000) ..... passim

Arizona v. Fulminante,
499 U.S. 279 (1991) 39

Atkins v. Virginia,
536 U.S. 304 (2002) 33

Ballew v. Georgia,
435 U.S. 223 (1978) 53

Barber v. State,
4 So. 3d 9 (Fla. Dist. Ct. App. 2009) 35

Barclay v. Florida,
463 U.S. 939 (1983) 26, 34

Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal., Inc.,
522 U.S. 192 (1997) 28

Beck v. Alabama,
447 U.S. 625 (1980) 57

Blakely v. Washington,
542 U.S. 296 (2004) 2, 14, 20, 41

Brown v. Sanders,
546 U.S. 212 (2006) 17, 18

Burch v. Louisiana,
441 U.S. 130 (1979) 25, 51

Cabana v. Bullock,
474 U.S. 376 (1986) 31, 37

Caldwell v. Mississippi,
472 U.S. 320 (1985) 48, 49, 50

California v. Ramos,
463 U.S. 992 (1983) 18

Caterpillar Inc. v. Lewis,
519 U.S. 61 (1996) 42

Cheshire v. State,
568 So. 2d 908 (Fla. 1990) 6, 25

Clark v. State,
808 N.E.2d 1183 (Ind. 2004) 39

Clemons v. Mississippi,
494 U.S. 738 (1990) 30

Commonwealth v. Roney,
866 A.2d 351 (Pa. 2005) 21

Cunningham v. California,
549 U.S. 270 (2007) 41

Darden v. Wainwright,
477 U.S. 168 (1986) 49

Dillon v. United States,
560 U.S. 817 (2010) 22, 23

Dobbert v. Florida,
432 U.S. 282 (1977) ..... passim

Dugger v. Adams,
489 U.S. 401 (1989) 48, 49

Duncan v. Louisiana,
391 U.S. 145 (1968) 52

Espinosa v. Florida,
505 U.S. 1079 (1992) 24, 26, 37, 45

Ex Parte Waldrop,
859 So. 2d 1181 (Ala. 2002) 38

Furman v. Georgia,
408 U.S. 238 (1972) 4

Globe v. State,
877 So. 2d 663 (Fla. 2004) 49

Glossip v. Gross,
135 S. Ct. 2726 (2015) 34

Graham v. Florida,
560 U.S. 48 (2010) 33

Harris v. Alabama,
513 U.S. 504 (1995) ..... passim

Harris v. Quinn,
134 S. Ct. 2618 (2014) 36

Hildwin v. Florida,
490 U.S. 638 (1989) ..... passim

Hilton v. S.C. Pub. Rys. Comm'n,
502 U.S. 197 (1991) 55

Howell v. Mississippi,
543 U.S. 440 (2005) 29

In re Standard Jury Instructions in Criminal Cases-Report No. 2005-2,
22 So. 3d 17 (Fla. 2009) 54

Jeffries v. Blodgett,
5 F.3d 1180 (9th Cir. 1993) 48

Johnson v. Louisiana,
406 U.S. 356 (1972) 51, 52, 54

Johnson v. State,
100 So. 3d 1158 (Fla. Dist. Ct. App. 2012) 35

Jones v. State,
855 So. 2d 611 (Fla. 2003) 20

Jones v. United States,
526 U.S. 227 (1999) 30, 44, 45

Jones v. United States,
527 U.S. 373 (1999) 42

Kansas v. Marsh,
548 U.S. 163 (2006) 21, 37

Kennedy v. Louisiana,
554 U.S. 407 (2008) 34

Lambrix v. Singletary,
520 U.S. 518 (1997) 1, 24

Lebron v. State,
982 So. 2d 649 (Fla. 2008) 51

Lee v. Comm'r, Ala. Dep't of Corr.,
726 F.3d 1172 (11th Cir. 2013) 21

Lockett v. Ohio,
438 U.S. 586 (1978) 58

Lowenfield v. Phelps,
484 U.S. 231 (1988) 19, 22, 47

Marshall v. State,
604 So. 2d 799 (Fla. 1992) 25

McCleskey v. Kemp,
481 U.S. 279 (1987) 58

McDonald v. City of Chicago,
561 U.S. 742 (2010) 56

McKoy v. North Carolina,
494 U.S. 433 (1990) 53

Michigan v. Bay Mills Indian Cmty.,
134 S. Ct. 2024 (2014) 36

Miller v. Alabama,
132 S. Ct. 2455 (2012) 33

Mungin v. State,
689 So. 2d 1026 (Fla. 1995) 40

Neder v. United States,
527 U.S. 1 (1999) 39

Oregon v. Ice,
555 U.S. 160 (2009) 23, 24, 37, 38

Ortiz v. State,
869 A.2d 285 (Del. 2005) 38

Pagan v. State,
29 So. 3d 938 (Fla. 2009) 49

Parker v. Dugger,
498 U.S. 308 (1991) 5, 26

Preston v. State,
607 So. 2d 404 (Fla. 1992) 42

Proffitt v. Florida,
428 U.S. 242 (1976) ..... passim

Reed v. Quarterman,
504 F.3d 465 (5th Cir. 2007) 47

Richardson v. United States,
526 U.S. 813 (1999) 47

Ring v. Arizona,
536 U.S. 584 (2002) ..... passim

Rita v. United States,
551 U.S. 338 (2007) 23

Robertson v. State,
143 So. 3d 907 (Fla. 2014) 6

Roper v. Simmons,
543 U.S. 551 (2005) 33

Rose v. Clark,
478 U.S. 570 (1986) 40

Ross v. State,
386 So. 2d 1191 (Fla. 1980) 25

Sattazahn v. Pennsylvania,
537 U.S. 101 (2003) 17, 47

Schad v. Arizona,
501 U.S. 624 (1991) 46, 47, 56

Schriro v. Summerlin,
542 U.S. 348 (2004) 35, 57

Spaziano v. Florida,
468 U.S. 447 (1984) ..... passim

Spencer v. State,
615 So. 2d 688 (Fla. 1993) 5, 11

State v. Brown,
129 P.3d 947 (Ariz. 2006) 41

State v. Dixon,
283 So. 2d 1 (Fla. 1973) 26

State v. Steele,
921 So. 2d 538 (Fla. 2005) ..... passim

Tedder v. State,
322 So. 2d 908 (Fla. 1975) 6

Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co.,
549 U.S. 443 (2007) 29

Tucker v. State,
987 So. 2d 717 (Fla. Dist. Ct. App. 2008) 35

Tuilaepa v. California,
512 U.S. 967 (1994) 19

United States v. Allen,
406 F.3d 940 (8th Cir. 2005) 40

United States v. Booker,
543 U.S. 220 (2005) 23, 39

United States v. Cunningham,
405 F.3d 497 (7th Cir. 2005) 41

United States v. Gaudin,
515 U.S. 506 (1995) 56

United States v. Int'l Bus. Machs. Corp.,
517 U.S. 843 (1996) 31

United States v. Revels,
455 F.3d 448 (4th Cir. 2006) 41

United States v. Robinson,
367 F.3d 278 (5th Cir. 2004) 40

United States v. Sampson,
486 F.3d 13 (1st Cir. 2007) 21

Walton v. Arizona,
497 U.S. 639 (1990) 45

Washington v. Recuenco,
548 U.S. 212 (2006) 39

Way v. State,
760 So. 2d 903 (Fla. 2000) 43

Weeks v. Angelone,
528 U.S. 225 (2000) 44

Williams v. Florida,
399 U.S. 78 (1970) 52, 56

Williams v. New York,
337 U.S. 241 (1949) 32

Woodson v. North Carolina,
428 U.S. 280 (1976) 31, 33

Woodward v. Alabama,
134 S. Ct. 405 (2013) 25

Yee v. City of Escondido, Cal.,
503 U.S. 519 (1992) 28, 29

Zakrzewski v. State,
717 So. 2d 488 (Fla. 1998) 25

Zant v. Stephens,
462 U.S. 862 (1983) 18

Zeigler v. State,
402 So. 2d 365 (Fla. 1981) 25

Statutes and Rules

Colo. Rev. Stat. § 18-1.3-1201 20

Del. Code Ann. tit. 11, § 4209 20

Fla. R. App. P 9.142 ..... 6, 7

Fla. R. Crim. P 3.440 5

Fla. Stat. § 782.04 19

Fla. Stat. § 921.141 ..... 6, 17, 19, 22

Miss. Code Ann. § 99-19-101 20

Sup. Ct. R. 14.1(a) 28

Tenn. Code Ann. § 39-13-204 20

Other Authorities

Dennis J. Devine et al., *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 Psychol. Pub. Pol'y & L. 622 (2001) 53

Hon. Alex Kozinski, Preface, *Criminal Law 2.0*, 44 Geo. L.J. Ann. Rev. Crim. Proc. iii (2015) 36

John H. Langbein, *The Origins of Adversary Criminal Trial* (2003) 32

Michael L. Radelet, *Overriding Jury Sentencing Recommendations in Florida Capital Cases: An Update and Possible Half-Requiem*, 2011 Mich. St. L. Rev. 793 25

Scott E. Sundby, *War and Peace in the Jury Room: How Capital Juries Reach Unanimity*, 62 Hastings L.J. 103 (2010) 54

Theodore Eisenberg et al., *Forecasting Life and Death: Juror Race, Religion, and Attitude Toward the Death Penalty*, 30 J. Legal. Stud. 277 (2001) 54

INTRODUCTION

For murdering Cynthia Harrison, Timothy Lee Hurst was tried, convicted, and sentenced to death. Hurst's death sentence came only after the court and the jury found beyond a reasonable doubt that Hurst's crime involved at least one aggravating circumstance. In a detailed written order, the trial court specifically found two: that Hurst committed the murder during the course of a robbery and that the crime was especially heinous, atrocious, or cruel. JA261-63.

In the Florida Supreme Court, Hurst admitted the aggravating circumstances, characterizing the crime as a "robbery gone bad" and disclaiming any challenge to the aggravating circumstance findings. Appellant's Initial Br. 24-25 (No. SC12-1947). He nonetheless argues here that *Ring v. Arizona,* 536 U.S. 584 (2002), entitled him to specific jury findings regarding the aggravating factors he conceded. He further argues that only the jury—and not the judge—can impose a death sentence. Hurst asks too much of *Ring*.

This Court has consistently upheld Florida's capital sentencing scheme, which in essence treats the judge and the jury as "cosentencer[s]." *See Lambrix v. Singletary*, 520 U.S. 518, 528 (1997). The Court has rejected claims that the jury must decide the sentence, *Spaziano v. Florida*, 468 U.S. 447, 465 (1984), that a court cannot rely on its own findings, *Hildwin v. Florida*, 490 U.S. 638, 640 (1989) (per curiam), and that the overall scheme leads to arbitrary sentences,

Proffitt v. Florida, 428 U.S. 242, 251 (1976) (joint opinion of Stewart, Powell, Stevens, JJ.).

Ring undermined none of this. Instead, *Ring* narrowly held that the principle of *Apprendi v. New Jersey* applies to capital sentencing, meaning a defendant cannot become eligible for a death sentence based on facts found solely by a judge "sitting without a jury." *Ring*, 536 U.S. at 609 (citing 530 U.S. 446, 494 n.19 (2000)). Even under this rule, the judge may impose any sentence authorized "on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Blakely v. Washington*, 542 U.S. 296, 303 (2004). And in this case, the "facts" necessary to make Hurst eligible for death were both reflected in the jury's decision and admitted by Hurst. Hurst's sentence complies with *Apprendi* and *Ring*.

Florida's capital sentencing scheme was constitutional before *Ring*, and it remains constitutional in light of *Ring*.

STATEMENT

A. Timothy Lee Hurst's Crime

On the morning of May 2, 1998, there was a murder and robbery at a Popeye's Fried Chicken restaurant in Pensacola. JA27. Cynthia Harrison, a young assistant manager, was scheduled to begin work at eight that morning. JA27. Around 10:30, other employees entered the restaurant and found the restaurant's safe unlocked and open, its contents ($375 and the previous day's receipts) missing. JA28-

29. They also found Ms. Harrison, dead on the floor inside the freezer. JA28-29.

Black electrical tape bound Ms. Harrison's hands and covered her mouth. JA29. She had suffered "at least sixty slash and stab wounds," including on her face, neck, back, and arms. JA129. The wounds, which were consistent with those a box cutter would inflict, included some so deep that they "cut through the tissue into the underlying bone." JA29. Although it appeared someone had tried to clean the scene, a "significant amount" of Ms. Harrison's blood remained on the floor, JA129, and blood on her pant knees indicated she had been kneeling in it, JA29. Her blood was also on a box cutter that lay nearby. JA129.

Other than Ms. Harrison, the only employee scheduled to work at eight that morning was Hurst. JA27-28. Evidence at trial showed that Ms. Harrison and Hurst were alone in the restaurant at the time of the murder. JA27-28. Evidence also showed that the box cutter at the scene was like one Hurst displayed a few days earlier but not the type used at Popeye's. JA29. And evidence showed that the electrical tape that bound Ms. Harrison was similar to tape later found in Hurst's car. JA29.

According to Hurst's friend Michael Williams, Hurst had previously talked about robbing Popeye's and subsequently admitted murdering Ms. Harrison with a box cutter. JA130. A second friend, Lee-Lee Smith, similarly testified that Hurst admitted the murder and robbery. JA130; *see also* JA597-99. According to Smith, Hurst came to Smith's house that morning and asked Smith to keep a container filled

with the robbery's proceeds. JA30. Smith further testified that he washed Hurst's bloody pants and threw away Hurst's shoes and bloodstained socks. JA30. Police later recovered the shoes and other evidence (including Ms. Harrison's driver's license and coin purse, a bank bag marked with "Popeye's" and Ms. Harrison's name, and a bank deposit slip bearing Hurst's fingerprints) from a trash can at Smith's house. JA30-31.

Authorities promptly apprehended Hurst and charged him with murder. From the beginning, Hurst denied that he ever made it to work that morning, explaining that car troubles kept him away. JA31. He provided a statement to police, recounting his supposed activities that day and insisting that he was not at Popeye's when Ms. Harrison was murdered. JA31.

Hurst was convicted of murder and twice sentenced to death. JA289, 297.

B. Florida's Death Sentencing Framework

Florida's capital sentencing scheme originated with Florida's response to *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam). *See Dobbert v. Florida*, 432 U.S. 282, 288, 294-95 (1977). The revised system, upheld in *Proffitt v. Florida*, 428 U.S. 242 (1976), provides for "substantial" additional protections, including a bifurcated sentencing proceeding and a limited class of crimes eligible for death—those with one or more aggravating circumstances. *Dobbert*, 432 U.S. at 290-91, 294-95; *Proffitt*, 428 U.S at 251-53 (joint opinion of Stewart, Powell, Stevens, JJ.). From

conviction to sentencing, Florida's system encompasses these steps:

First, absent a guilty plea or waiver, a unanimous jury determines the defendant's guilt. *See* Fla. R. Crim. P. 3.440. In some cases, the conviction also includes a determination that a statutory aggravating circumstance exists—if, for example, the jury concurrently convicts the defendant of a crime that constitutes an aggravating circumstance under Florida law. *See infra* at 19-21.

Second, a separate sentencing proceeding follows any capital conviction, allowing the defendant to present mitigating evidence that was not part of the guilt phase, and allowing the State to present additional evidence of aggravating circumstances. *See Dobbert*, 432 U.S. at 295. The jury provides "an advisory verdict based upon its perception of aggravating and mitigating factors in the case." *Id.* The jury may recommend death only if it finds at least one aggravating circumstance beyond a reasonable doubt and determines that mitigating circumstances do not outweigh aggravators. *State v. Steele*, 921 So. 2d 538, 545 (Fla. 2005); *see also Parker v. Dugger*, 498 U.S. 308, 318 (1991), *holding modified on other grounds by Brown v. Sanders*, 546 U.S. 212 (2006).

Third, after the jury's weighing and recommendation, the court holds a *Spencer* hearing allowing both sides to present additional evidence or argument and allowing the defendant to address the court directly. *See Spencer v. State*, 615 So. 2d 688, 690-91 (Fla. 1993).

Fourth, after the *Spencer* hearing, the trial court conducts its own, independent weighing and imposes the sentence. The court may impose a death sentence "only after making a written finding that there are insufficient mitigating circumstances to outweigh the aggravating circumstances." *Dobbert*, 432 U.S. at 295; *see also* Fla. Stat. § 921.141(3) (2011).[1] In making its decision, the court must give the jury's recommendation "great weight," and if the jury recommends life, the court may impose death only in the most extraordinary circumstances. *See Tedder v. State*, 322 So. 2d 908, 911 (Fla. 1975) (precluding override of life recommendation unless "the facts suggesting a sentence of death [were] so clear and convincing that virtually no reasonable person could differ"); *see also Cheshire v. State*, 568 So. 2d 908, 910 (Fla. 1990) (noting override authorized only when there is no reasonable basis in the record for life recommendation). No Florida judge has overridden a jury's life recommendation since 1999. *See infra* n.9.

Finally, the Florida Supreme Court automatically reviews all death sentences, conducting a full record review for sufficiency of evidence and proportionality, regardless of whether the defendant seeks appellate review. *See Robertson v. State*, 143 So. 3d 907, 908-09 (Fla. 2014); *see also* Fla. Stat. § 921.141(4); Fla. R. App. P 9.142(a)(5).

Hurst's trial and sentencing proceeded under this framework.

---

[1] All citations of Florida Statutes are to the version effective at Hurst's resentencing.

C. Procedural History

1. Hurst's Conviction and Initial Sentence

Hurst was convicted of first-degree murder after a four-day jury trial in March, 2000. He never questioned whether Ms. Harrison's murder took place during the course of a robbery. In fact, his opening statement began by acknowledging that "the evidence in this case is going to be that on May the 2nd, 1998, sometime during the early morning hours there was a death and robbery at the Popeye's." 2000 ROA Tr. 167.[2] Hurst simply argued that someone else did it.[3]

The State's theory, on the other hand, was that it was Hurst who murdered Cynthia Harrison in the course of robbing Popeye's. As Hurst later put it in his postconviction motion, the State's case was that the murder "involved, at a minimum, a robbery of significant amounts of cash from a safe and cash register." 2007 ROA R.283.

---

[2] The Florida Supreme Court's most recent review of Hurst's case included records associated with his previous appeals. *See* Fla. R. App. P. 9.142(a)(1). References to materials not reproduced in the Joint Appendix are identified by the associated Florida Supreme Court record on appeal (ROA).

[3] That someone, he argued, was Hurst's friend, Lee-Lee Smith. In closing argument, Hurst's counsel disputed Smith's testimony that Hurst admitted he "robbed the place and killed the lady"; instead, Hurst's counsel argued, "that's precisely what Lee-Lee Smith did to the lady. Exactly what he did to her." 2000 ROA Tr. 860.

The court instructed the jury that Hurst faced a charge of first-degree murder, which could take the form of premeditated murder or felony murder, with robbery as the predicate for felony murder. 2000 ROA Tr. 919-21. The jury returned a unanimous guilty verdict for first-degree murder, without specifying premeditated murder or felony murder. 2000 ROA R.448.

In the penalty phase that followed, the court instructed the jury that it could recommend death only if it found at least one aggravating circumstance beyond a reasonable doubt and if it found insufficient mitigating evidence to outweigh any aggravators. 2000 ROA Tr. 983-84. The court instructed on two possible aggravating circumstances: that the murder was committed in the course of a robbery, and that the murder was "especially heinous, atrocious, or cruel." 2000 ROA Tr. 984. The jury returned an 11-1 vote recommending death. 2000 ROA R.450.

In his sentencing memorandum filed after the recommendation, Hurst acknowledged that "[t]he State established two aggravating circumstances," the robbery and the heinous, atrocious, or cruel factor. 2000 ROA R.451. Rather than contest the aggravators, Hurst argued that "[t]he mitigators outweigh the aggravators, and the defendant should be sentenced to life." 2000 ROA R.453.[4]

---

[4] Hurst raised a number of claims in his motion to vacate his conviction, filed in 2003 and supplemented four times over the following two years, *see infra* at 10. While Hurst alleged his trial counsel was ineffective on over a half-dozen grounds, he never challenged counsel's conceding that the murder took place during

The trial court sentenced Hurst to death, finding both aggravating circumstances, along with a third: that Hurst committed the crime to avoid arrest. JA32.

2. Hurst's Florida Supreme Court Appeal

Hurst challenged his death sentence in the Florida Supreme Court. He did not challenge his murder conviction, but the Florida Supreme Court nonetheless independently examined the record and found sufficient evidence to support the conviction. JA33.

Regarding the death sentence, the Florida Supreme Court rejected the trial court's avoiding-arrest determination. The court found the error harmless, however, because of the strength of the other aggravators. JA35-36. Indeed, the court recognized, the remaining two were undisputed: "Hurst does not challenge the aggravating factors found by the trial court that the murder was especially heinous, atrocious, or cruel (HAC), or that the murder took place during the course of a robbery." JA33. The Florida Supreme Court affirmed, JA50, and this Court denied certiorari, 537 U.S. 977 (2002).[5]

---

the course of a robbery. JA53-126, 150, 175-76. Regardless, even after resentencing, Hurst offered the same concession in the Florida Supreme Court. *See infra* at 12.

[5] Hurst's certiorari petition alleged that Florida's death sentencing scheme violated *Ring* because it "*requires* fact findings by the trial judge before a death sentence may be imposed." 02-5912 Pet. 12.

3. Hurst's Resentencing and Appeal

Hurst returned to the trial court and petitioned for postconviction relief. JA53-54. After the lower court denied relief, Hurst again appealed to the Florida Supreme Court. JA127.

The Florida Supreme Court rejected all of Hurst's guilt-phase claims but vacated the death sentence after finding trial counsel ineffective for failing to investigate certain mitigation evidence at the penalty phase. JA176, 191. The court again acknowledged that "the facts of the murder established that it was especially heinous, atrocious or cruel," and "that the murder was committed during a robbery." JA188. However, it found that a proper investigation might have produced additional mitigating evidence showing, for example, Hurst's borderline intelligence and possible fetal alcohol syndrome. JA185-87. The court remanded for resentencing to allow that mitigating evidence to be weighed against the aggravators. JA192.

During the 2012 resentencing proceeding, the jury heard a range of new mitigation evidence. Hurst presented expert evidence about his alleged mental disorders, intellectual disability, and fetal alcohol syndrome. *See* JA300-04. Hurst did not, however, present evidence questioning whether the murder involved a robbery; his counsel argued instead that the jury could find reasonable doubt whether Hurst was more than a minor participant in the crime. JA977-80.

Like the first jury, this jury was instructed that any death recommendation must include a finding of an aggravating circumstance:

> An aggravating circumstance must be proven beyond a reasonable doubt before it may be considered by you in arriving at your recommendation. In order to consider the death penalty as a possible penalty, you must determine that at least one aggravating circumstance has been proven.
>
> The State has the burden to prove each aggravating circumstance beyond a reasonable doubt.
>
> If you find the aggravating circumstances do not justify the death penalty, your advisory sentence should be one of life imprisonment .
>
> Should you find sufficient aggravating circumstances do exist to justify recommending the imposition of the death penalty, it will then be your duty to determine whether the mitigating circumstances outweigh the aggravating circumstances that you find to exist.

JA210-13. By a 7-5 vote, the jury recommended death. JA217. The trial court held a *Spencer* hearing, during which neither side submitted additional evidence. JA218-29; Pet'r Br. 11. The court then sentenced Hurst to death in a detailed, written order. JA258-71.

Hurst again appealed to the Florida Supreme Court. He candidly admitted that "[w]ithout any contention, this is a two aggravator case" and noted that he "does not challenge the trial court's findings that the murder was committed during the course of a robbery, and it was especially heinous, atrocious, or cruel. He also does not question the seriousness of these aggravators." Appellant's Initial Br. 24 (No. SC12-1947) (citation omitted). He nonetheless argued that there were sufficient mitigating circumstances to outweigh the admitted aggravators, and that a death sentence was disproportionate to the crime, which he described as a simple "robbery gone bad." *Id.* at 18.

The Florida Supreme Court affirmed, JA314, and this Court granted certiorari.

SUMMARY OF THE ARGUMENT

1. Florida's capital sentencing framework is fully consistent with *Ring v. Arizona*, 536 U.S. 584 (2002). *Ring* set forth a narrow and specific rule: other than the existence of a prior conviction, capital defendants are entitled to a jury determination of "any fact on which the legislature conditions an increase in their maximum punishment," including the existence of an aggravating circumstance. *Id.* at 589, 609. Florida's system, which divides sentencing responsibility between judge and jury, leaves the ultimate decision with the judge, but still provides for a jury determination of whether there is at least one aggravating circumstance—meaning the jury decides whether there are sufficient facts making the defendant *eligible* for the death penalty. *Ring* requires nothing more.

Ring says nothing about who may decide whether a defendant eligible for the death penalty will actually receive the death penalty.

Once jury findings (or admissions) demonstrate at least one aggravating circumstance, the defendant is eligible for the death penalty. At that point, any additional court findings do not enhance the maximum penalty the defendant may receive, so they do not implicate *Ring*. The Court has long affirmed judges' broad sentencing discretion to impose sentences within the authorized range, even when judicial factfinding informs that discretion. By requiring the jury *and* the judge to find at least one aggravating circumstance (as opposed to the jury alone), Florida's hybrid system only provides additional protections. Additional protections do not violate *Ring*.

Nor does leaving the ultimate sentencing decision with the judge violate *Ring*. The Court has consistently recognized that the Constitution does not require jury sentencing. Even if jury sentencing were properly before the Court (this argument was neither presented in Hurst's certiorari petition nor preserved below), this Court should not overturn settled precedent upholding the hybrid judge-jury systems of Florida and other states.

2. Hurst conceded the presence of aggravating factors, and a jury found beyond a reasonable doubt that Hurst was eligible for the death penalty. Therefore, whatever one thinks of Hurst's challenges to Florida's system in the abstract (or in other scenarios), the sentence in Hurst's case is constitutional.

Hurst's concessions remove his case from *Ring*'s scope, and Hurst's remaining challenges fail irrespective of *Ring*. The jury instructions (to which Hurst did not object) did not mislead; they accurately described the jury's role. And Hurst's jury unanimity argument fails because the Court has already recognized that jury unanimity does not "materially contribute" to the essential role of the jury, which is to interpose the commonsense judgment of a body of laymen between the accused and the accuser. In the specific context of Florida's capital sentencing, where the jury is a "cosentencer" with the judge, the jury fulfills that essential role.

Hurst received all that *Ring* requires. Florida's death sentencing scheme does not violate the Constitution in light of *Ring*.

ARGUMENT

Ring v. Arizona held that "Capital defendants, no less than noncapital defendants are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." 536 U.S. 584, 588 (2002). But *Ring* does not preclude an enhanced sentence based on facts "reflected in the jury verdict or admitted by the defendant." *Blakely v. Washington*, 542 U.S. 296, 303 (2004) (citing *Ring*) (emphasis omitted). Here, Hurst admitted facts that authorized his death sentence. Under Florida law, a single aggravating circumstance is sufficient to justify a death sentence, *see State v. Steele*, 921 So. 2d 538, 543 (Fla. 2005), and Hurst told the Florida Supreme Court "this is a two aggravator

case." Appellant's Initial Br. 24 (No. SC12-1947); *accord id.* (Hurst does "not challenge the trial court's findings that the murder was committed during the course of a robbery, and that it was especially heinous, atrocious, or cruel."). Hurst's concessions place this case beyond *Ring*'s scope.

Even without his concessions, Hurst's sentence satisfies *Ring*. Hurst received a death sentence only after a jury found beyond a reasonable doubt at least one aggravating circumstance. He thus received all *Ring* could require. 536 U.S. at 589.

Hurst's remaining arguments—that the Constitution commands jury-only sentencing, that his jury was improperly instructed, and that his jury's finding had to be unanimous—are not properly before the Court but fail on the merits.

Neither Hurst's sentence nor the Florida system that produced it violates the Constitution in light of *Ring*.

I. FLORIDA'S CAPITAL SENTENCING FRAMEWORK COMPLIES WITH *RING* AND *APPRENDI*'S NARROW RULE.

Florida's capital sentencing system has long divided responsibility between the judge and the jury. And for years, the Court has affirmed the constitutionality of Florida's divided system. *See, e.g.*, *Hildwin v. Florida*, 490 U.S. 638, 640 (1989) (per curiam); *Spaziano v. Florida*, 468 U.S. 447, 465 (1984); *Dobbert v. Florida*, 432 U.S. 282, 294-97 (1977); *Proffitt v. Florida*, 428 U.S. 242, 248-49 (1976) (joint opinion of

Stewart, Powell, Stevens, JJ.); *see also Harris v. Alabama*, 513 U.S. 504, 508-09, 515 (1995) (upholding Alabama system that was "much like that of Florida").

In the face of the Court's repeated holdings finding Florida's sentencing framework consistent with the Sixth and Eighth Amendments, Hurst argues that *Ring* fundamentally changed how the Court should view Florida's system. But Hurst conflates *Ring*'s narrow holding about death penalty *eligibility* with the issue of death penalty *selection*. So long as the jury finds—or the defendant admits—one aggravating circumstance, *Ring* is satisfied. After that, a trial court's independent findings justifying its selection do not implicate *Ring*.

A. Ring *Requires Only that Facts Necessary to Increase the Maximum Sentence Be Found by a Jury or Admitted by the Defendant.*

The rule of *Ring* and *Apprendi*, as the Court has stressed, is straightforward: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); *accord Ring*, 536 U.S. at 602. In *Ring*, the Court applied *Apprendi*'s rule to the capital sentencing context, where the "fact that increases the penalty" is the existence of an aggravating factor. Based on the Court's Eighth Amendment decisions, States must limit the class of murderers who are eligible for death, and this "narrowing requirement is usually met when the trier of fact finds at least one statutorily defined eligibility factor at either the guilt

or penalty phase." *Brown v. Sanders*, 546 U.S. 212, 216 (2006). The existence of an aggravating factor, therefore, is the necessary and sufficient fact that renders a defendant eligible for the death penalty.[6]

Florida law enumerates specific statutory aggravators, and a defendant is eligible for the death penalty if one or more of those aggravators is found. *Steele*, 921 So. 2d at 546. Thus, the Florida Legislature has determined that a murder featuring an aggravating circumstance (for example, a murder in the course of a robbery, *see* Fla. Stat. § 921.141(5)(d)), is "a greater offense" than a murder with no aggravating circumstance, *see generally Sattazahn v. Pennsylvania*, 537 U.S. 101, 112 (2003) (opinion of Scalia, J.), and only those guilty of that greater offense are eligible for death.

The finding of an aggravating circumstance is, therefore, a finding of eligibility for the death penalty under Florida law. This is distinct from the "determinat[ion] of which defendants *eligible* for the death penalty will actually receive that penalty." *Brown*, 546 U.S. at 216 & n.2. This second inquiry turns on the sentencer's weighing of the aggravating and mitigating circumstances. *Id.* at 216-17;[7] *see also*

---

[6] Since *Apprendi* and *Ring*, this Court has applied the rule more broadly to cover findings that did not change the statutory maximum. But the Court has kept the focus on findings that increase the statutory sentencing range. *See, e.g., Alleyne v. United States*, 133 S. Ct. 2151, 2155, 2160 (2013) (applying *Apprendi* to findings necessary for mandatory minimum); *see also id.* at 2165 (Sotomayor, J., concurring) (collecting cases).

[7] Dissenting in *Brown*, Justice Breyer similarly described death penalty proceedings as encompassing two discrete inquir-

California v. Ramos, 463 U.S. 992, 1008 (1983) ("Once the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty the jury then is free to consider a myriad of factors to determine whether death is the appropriate punishment."); *Zant v. Stephens*, 462 U.S. 862, 878 (1983) (distinguishing between statutory aggravators, which "circumscribe the class of persons eligible for the death penalty" and other factors that guide the "process of selecting, from among that class, those defendants who will actually be sentenced to death"). While *Ring* addressed the requirements for determining *eligibility* for death, it did not affect how sentencers *select* which of those eligible will be sentenced to death.

Under *Ring* and *Apprendi*, therefore, the sole question is whether Florida's sentencing framework requires a jury finding (or admission) on the existence of an aggravating factor—the only finding necessary to make a defendant *eligible* for the death penalty under Florida law.

In practice, Florida's system does just that. Absent a judicial override, which is not at issue in this case and has not been used since *Ring*, *see infra* n.9, no defendant is sentenced to death without a jury

---

ies. First, "the jury must determine whether there is something especially wrongful, *i.e.*, 'aggravating,' about the defendant's conduct." If it does, "the defendant is consequently eligible for the death penalty," and "the jury (or sometimes the judge) must determine whether to sentence the defendant to death . . . ." *Brown*, 546 U.S. at 228-29 (Breyer, J., dissenting).

finding beyond a reasonable doubt at least one aggravating factor (either at the guilt or penalty phase).

B. *The Eligibility Finding* Ring *Requires Need Not Be Determined at the Penalty Phase.*

Although Hurst's arguments focus on Florida's penalty-phase proceedings, jury findings frequently establish death penalty eligibility in the guilt phase. *Cf. Tuilaepa v. California*, 512 U.S. 967, 971-72 (1994) (to make defendant death eligible, "trier of fact must convict the defendant of murder and find one 'aggravating circumstance' (or its equivalent) at either the guilt or penalty phase."). This means *Ring*'s requirement is often satisfied before the penalty phase even begins. Unlike the Arizona system challenged in *Ring*, Florida's system allows eligibility determinations at the guilt *or* penalty phase. *See* JA315, 316, 318 (Pariente, J., dissenting); *see also Ring*, 536 U.S. at 612-13 (Scalia, J., concurring).

So, for example, when a jury convicts someone for felony murder committed during the course of an enumerated crime (such as robbery, *see* Fla. Stat. § 782.04(1)(a)2.), that jury's determination necessarily establishes the defendant's eligibility for a death sentence. In that situation, an element of the crime (robbery) also constitutes an aggravating circumstance (robbery, *see* Fla. Stat. § 921.141(5)(d)), so the jury's verdict establishes both guilt for first-degree felony murder and an aggravating circumstance. *Cf. Lowenfield v. Phelps*, 484 U.S. 231, 241 (1988) (holding that death sentence could be based on aggravating circumstance identical to element of capital crime); *Tuilaepa*, 512 U.S. at 972 ("The aggravating circum-

stance may be contained in the definition of the crime or in a separate sentencing factor (or in both)."). A defendant in that scenario still has a penalty-phase proceeding for the weighing of aggravating and mitigating circumstances, but no additional findings are necessary to establish eligibility.

Separately, *Ring* does not require jury findings establishing earlier convictions. *See Blakely*, 542 U.S. at 301, 304. Florida, like a number of other states, includes prior violent felony convictions among the statutory aggravating circumstances. *See* Fla. Stat. § 921.141(5)(b); *see also, e.g.*, Colo. Rev. Stat. § 18-1.3-1201(5)(b); Del. Code Ann. tit. 11, § 4209(e)(1)(i); Miss. Code Ann. § 99-19-101(5)(b); Tenn. Code Ann. § 39-13-204(i)(2). This eliminates approximately sixty percent of Florida's capital cases from *Ring*'s scope, as defendants in those cases also enter their sentencing phases already death eligible. *See, e.g.*, *Jones v. State*, 855 So. 2d 611, 619 (Fla. 2003); *cf. also* Pet. 29 (noting that "except for this and a few other cases, defendants usually had prior convictions for violent felonies, which can justify a death sentence, and significantly lifted imposition [of a] sentence beyond any *Ring* problems") (statutory citation omitted).

Between guilt-stage jury findings establishing aggravating circumstances (findings that satisfy *Ring*) and judicial findings about prior convictions (findings that do not implicate *Ring*), the vast majority of Florida's capital defendants (approximately ninety percent) enter the penalty phase already eligible for a death sentence. *Cf.* JA318 (Pariente, J., dissenting) (noting it is a "rare case where the death penalty is imposed without any of the aggravators that automat-

ically demonstrate that a jury has made the necessary findings to warrant the possibility of a death sentence, such as a prior violent felony conviction or that the murder occurred while in the course of an enumerated felony that was also found by a jury").

In the remaining cases, jury findings at the penalty phase establish eligibility. Either way, once death penalty eligibility is established, the sentencing judge's additional findings do not enhance the maximum punishment. Accordingly, *those* findings do not implicate *Ring*.

C. *Neither* Ring *nor Any Constitutional Provision Precludes Additional Judge Findings Once a Defendant Is Death Eligible.*

Overreading *Ring*, Hurst argues that the Sixth Amendment precludes a judge from relying on any independent findings in imposing a death sentence.[8] This not only conflates findings necessary for death *eligibility* (governed by *Ring*) with findings involved in sentencing *selection* (not governed by *Ring*), but also

---

[8] Hurst does not argue specifically, however, that a jury must determine the "factual issue" of whether mitigation outweighs aggravators. Federal and state courts have consistently held that this weighing is not a factual question at all. *See, e.g.*, *United States v. Sampson*, 486 F.3d 13, 32 (1st Cir. 2007) (rejecting *Ring* argument because "the requisite weighing constitutes a process, not a fact to be found") (collecting cases); *Lee v. Comm'r, Ala. Dep't of Corr.*, 726 F.3d 1172, 1198 (11th Cir. 2013); *Commonwealth v. Roney*, 866 A.2d 351, 360 (Pa. 2005); *see also generally Kansas v. Marsh*, 548 U.S. 163, 174 (2006) (highlighting discretion States enjoy "including the manner in which aggravating and mitigating circumstances are to be weighed").

ignores the substantial protections Florida's hybrid system provides.

1. Court Findings After Death Eligibility Is Established Do Not Violate Ring.

To be sure, Florida's statute requires the court to make written findings about aggravating circumstances when imposing a death sentence. *See* Fla. Stat. § 921.141(3). But for a defendant already death eligible under *Ring* (whether based on jury findings, admissions, or prior convictions), the additional requirement that a judge *also* find an aggravator only provides the defendant additional protection. "The use of 'aggravating circumstances' is not an end in itself, but a means of genuinely narrowing the class of death-eligible persons and thereby channeling the jury's discretion." *Lowenfield*, 484 U.S. at 244. A defendant already in that narrower class is unaffected by *Ring*. Under Florida's system, that defendant "will never get *more* punishment than he bargained for when he did the crime," solely based on a judge's findings. *Apprendi*, 530 U.S. at 498 (Scalia, J., concurring).

Because the trial court's findings at sentencing do not relate to an element of an enhanced offense, they "do not serve to increase the prescribed range of punishment," *Dillon v. United States*, 560 U.S. 817, 828 (2010). Instead, they are more akin to "the judge's exercise of discretion within that range," consistent with *Apprendi* and *Ring*. *Id.* at 828. Judges "'have long exercised discretion of this nature in imposing sentence *within [established] limits* in the individual case,' and the exercise of such discretion does not contravene the

Sixth Amendment even if it is informed by judge-found facts." *Id.* at 828-29 (quoting *Apprendi*, 530 U.S. at 481) (alterations in *Dillon*). Nothing in *Apprendi* or *Ring* changed this. Indeed, years after *Ring*, the Court held that "broad sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment." *Alleyne v. United States*, 133 S. Ct. 2151, 2163 (2013); *accord id.* ("Our ruling today does not mean that any fact that influences judicial discretion must be found by a jury."); *United States v. Booker*, 543 U.S. 220, 233 (2005) ("For when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant"); *Rita v. United States*, 551 U.S. 338, 354 (2007) ("[W]e have never held that 'the Sixth Amendment prohibits judges from ever finding any facts' relevant to sentencing.") (quoting *id.* at 373 (Scalia, J., concurring in part and concurring in the judgment)); *accord Apprendi*, 530 U.S. at 481.

There is no reason, therefore, to extend *Ring* to the findings a judge does make under Florida's system. The Sixth Amendment right in *Ring* does not attach every time a sentencing scheme involves judicial fact-finding. In *Oregon v. Ice*, for example, the Court upheld a statutory scheme providing for concurrent sentences unless a judge alone found certain facts. 555 U.S. 160 (2009). The Court rejected the notion that deciding whether to impose consecutive or concurrent sentences was "within the jury function that 'extends down centuries into the common law.'" *Id.* at 168 (quoting *Apprendi*, 530 U.S. at 477). Instead, any "entitlement" the defendant had to concurrent sentences absent judicial findings flowed

only from "statutory protections meant to temper the harshness of the historical practice" favoring consecutive sentences. *Id.* at 169.

Like the Oregon system's deviation from tradition to temper earlier harshness, Florida's conditioning a death sentence on judicial findings deviates from the tradition of mandatory death sentences or complete judicial discretion. That deviation, designed to protect defendants, *see infra* at 26-27, does not violate the Constitution.

2. Florida's Extensive Jury Involvement Exceeds Ring's *Requirement and Provides Additional Protections.*

Ring requires no jury involvement after a jury finds (or a defendant admits) an aggravating circumstance. *See supra* Part I.A. Florida's statutory system nonetheless demands substantial jury involvement to ensure capital punishment is properly limited.

Under its hybrid system, "Florida has essentially split the weighing process in two. Initially, the jury weighs aggravating and mitigating circumstances, and the result of that weighing process is then in turn weighed within the trial court's process of weighing aggravating and mitigating circumstances." *Espinosa v. Florida*, 505 U.S. 1079, 1082 (1992) (per curiam); *see also Lambrix v. Singletary*, 520 U.S. 518, 528 (1997) (describing Florida's sentencing procedure and finding a Florida jury in essence "a cosentencer"). While a jury's recommendation carries "great weight," a judge receiving a jury's death recommendation "must still exercise its reasoned judgment in deciding

whether the death penalty should be imposed." *Ross v. State*, 386 So. 2d 1191, 1197 (Fla. 1980). On the other hand, the trial court may override a *life* recommendation only when it lacks any record support.[9] *See Cheshire v. State*, 568 So. 2d 908, 910-11 (Fla. 1990); *cf. Harris*, 513 U.S. at 508-10 (noting Court has "spo-

---

[9] Florida's statute does allow judges to override a *life* recommendation, a fact Hurst emphasizes. *See, e.g.*, Pet'r Br. 20-21. That fact is irrelevant here because the jury recommended death for Hurst. *See Burch v. Louisiana*, 441 U.S. 130, 132 n.4 (1979) (petitioner convicted by unanimous jury lacks standing to challenge the constitutionality of Louisiana provision allowing conviction by nonunanimous jury). Regardless, these overrides are essentially nonexistent in Florida. The last time a Florida judge sentenced a defendant to death over the jury's recommendation was years before *Ring*. *See Woodward v. Alabama*, 134 S. Ct. 405, 408 (2013) (Sotomayor, J., dissenting from denial of certiorari) ("[N]o Florida judge has overridden a jury's verdict of a life sentence since 1999."); *accord* Michael L. Radelet, *Overriding Jury Sentencing Recommendations in Florida Capital Cases: An Update and Possible Half-Requiem*, 2011 Mich. St. L. Rev. 793, 809. Only three of Florida's current death row inmates were sentenced over the jury's life recommendation, and each entered the penalty phase already death eligible. Matthew Marshall had nine prior violent felony convictions. *Marshall v. State*, 604 So. 2d 799, 805 (Fla. 1992). Edward Zakrzewski and William Zeigler were both convicted of multiple counts of murder. *Zakrzewski v. State*, 717 So. 2d 488, 491 (Fla. 1998) (jury recommended death for two of his three murders); *Zeigler v. State*, 402 So. 2d 365, 375 (Fla. 1981) (jury recommended life for two first-degree murders and convicted for two additional second-degree murders); *see also Francis v. State*, 808 So. 2d 110, 136 (Fla. 2001) (holding that when defendant is convicted of multiple murders, the contemporaneous conviction as to one victim can support the prior violent felony aggravator as to another).

ken favorably of the deference that a judge must accord the jury verdict under Florida law").[10]

This hybrid system provides several benefits. In *Dobbert v. Florida*, which upheld Florida's death sentencing system, then-Justice Rehnquist emphasized perhaps the most obvious one: "[D]efendants have a second chance for life with the trial judge " 432 U.S. at 296. Defendants whose crimes might inflame juries may benefit from judicial detachment and experience. But there are other benefits, too. Allowing the trial court to override a jury's death recommendation helps the system "rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not." *Spaziano*, 468 U.S. at 460 (citations omitted). Separately, by conditioning a sentence on a trial judge's detailed, written findings, Florida's system provides "the opportunity for meaningful review" in the Florida Supreme Court as yet another layer of protection. *See State v. Dixon*, 283 So. 2d 1, 8 (Fla. 1973). The Court has "held specifically that the Florida Supreme Court's system of independent review of death sentences minimizes the risk of constitutional error." *Parker v. Dugger*, 498 U.S. 308, 321 (1991), *holding modified on other grounds by Brown*, 546 U.S. at 218; *see also, e.g., Barclay v. Florida*, 463 U.S. 939, 958 (1983) (plurality

---

[10] The role of Florida juries in sentencing is so critical that this Court held that a jury's reliance on an invalid aggravator required resentencing, even though the judge imposing the sentence independently found the same aggravator. "[I]f a weighing State decides to place capital sentencing authority in two actors rather than one, neither actor must be permitted to weigh invalid aggravating circumstances." *Espinosa*, 505 U.S. at 1082.

opinion) (citing favorably "the Florida Supreme Court's practice of reviewing each death sentence to compare it with other Florida capital cases and to determine whether 'the punishment is too great'") (quoting *Dixon*, 283 So. 2d at 10); *see also Dobbert*, 432 U.S. at 296.

Rather than dispute the benefits Florida's hybrid system provides, Hurst argues that the judge's independent findings—the additional requirement between the jury's finding and the death sentence—violate *Ring*. In other words, Hurst essentially argues that while a jury's conclusion alone *could* satisfy *Ring*, a jury's conclusion seconded by a judge's independent conclusion cannot. This illogical argument finds no support in *Ring*.

D. *Neither* Ring *nor Any Constitutional Provision Requires Jury Sentencing.*

In addition to arguing that a judge may not impose a death sentence that relies on her own findings, Hurst argues that a judge may not impose a death sentence at all. Instead, Hurst argues, the Eighth Amendment demands that juries—and only juries—make the death sentence determination. Because this issue was not preserved and is not within the question presented, the Court should not consider it. Regardless, the Court has long rejected claims that jury sentencing is constitutionally required, and Hurst presents no valid reason for the Court to abandon its settled law.

1. The Court should not address jury sentencing.

Hurst's petition did not argue that the Constitution requires jury sentencing. Instead, Hurst presented two issues: first, whether a jury must decide a contested intellectual disability claim, Pet. ii;[11] and second, a five-part question asking whether the Florida Supreme Court has correctly applied *Ring*, *id.* Because Hurst did not include the issue of jury sentencing in his petition, this Court should not consider it. *See Yee v. City of Escondido, Cal.*, 503 U.S. 519, 535 (1992); *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal., Inc.*, 522 U.S. 192, 207 (1997); Sup. Ct. R. 14.1(a).

It is no help to Hurst that the Court rephrased the question when granting certiorari. Like Hurst's second question, the Court's question is limited to whether Florida's sentencing system is constitutional in light of *Ring*. The claim in *Ring* was "tightly delineated" and did not include any argument "that the Sixth Amendment required the jury to make the ultimate determination whether to impose the death penalty." 536 U.S. at 597 n.4. Indeed, the Court quoted *Proffitt v. Florida*, which noted that it "has never [been] suggested that jury sentencing is constitutionally required." *Id.* (quoting *Proffitt*, 428 U.S. at 252 (joint opinion of Stewart, Powell, Stevens, JJ.)) (alterations in *Ring*); *accord id.* at 612 (Scalia, J., concurring) ("[T]oday's judgment has nothing to do

---

[11] Hurst's merits brief expressly waives any argument regarding his alleged intellectual disability, Pet'r Br. 13 n.4, and the State will not address the issue.

with jury sentencing."). Furthermore, the central holding of *Ring*—that judges cannot impose death sentences based solely on their own eligibility findings—would be beside the point if judges cannot issue death sentences at all. *Cf. Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co.*, 549 U.S. 443, 455 (2007) (declining to consider issue "analytically distinct from, and fundamentally at odds with," question presented).[12]

Separately, the Court should not reach the issue because Hurst did not raise it in the Florida Supreme Court, which in turn did not address it. *See Yee*, 503 U.S. at 533; *Howell v. Mississippi*, 543 U.S. 440, 443 (2005) (per curiam). But if the Court reaches the issue, it should abide by its sound and longstanding precedent.

2. The Constitution does not require jury sentencing.

In *Spaziano v. Florida*, the Court rejected the "fundamental premise that the capital sentencing decision is one that, in all cases, should be made by a jury." 468 U.S. at 458. It acknowledged the "unique aspects" of capital sentencing but held it ultimately "involves the same fundamental issue involved in any other sentencing proceeding—a determination of the appropriate punishment to be imposed on an individ-

---

[12] That Justice Breyer's separate opinion on jury sentencing concurred in the *Ring* judgment but disagreed with the Court's *Apprendi* rationale, 536 U.S. at 613-14 (Breyer, J., concurring in the judgment), only further demonstrates that jury sentencing is no logical outgrowth of *Ring*'s holding.

ual." *Id.* at 459 (citations omitted). And "[t]he Sixth Amendment never has been thought to guarantee a right to a jury determination of that issue." *Id.*; *accord Proffitt*, 428 U.S. at 252 (noting that the Court "has never suggested that jury sentencing is constitutionally required.").

In the years since *Spaziano*, the Court has only solidified this holding. In *Hildwin v. Florida*, the Court reaffirmed *Spaziano* and rejected the narrower claim that a death sentence could not stand without a specific jury finding on aggravating circumstances. 490 U.S. 638, 639-41 (1989) (per curiam).[13] Later, in *Harris v. Alabama*, the Court held "[t]he Constitution permits the trial judge, acting alone, to impose a capital sentence," rejecting the claim that the trial judge owed a particular level of deference to jury recommendations. 513 U.S. at 515. Finally, in *Jones v. United States*, which anticipated *Apprendi*, the Court noted that *Spaziano* had "addressed the argument that capital sentencing must be a jury task and rejected that position." 526 U.S. 227, 250 (1999); *see also Clemons v. Mississippi*, 494 U.S. 738, 745 (1990)

---

[13] Hurst argues that because *Hildwin* authorized death sentences "without a specific finding by the jury" on aggravating circumstances, 490 U.S. at 369, the decision did not survive *Apprendi* or *Ring*. Pet'r Br. 19. But as he later acknowledges, neither *Apprendi* nor *Ring* precluded the outcome in *Hildwin* because the aggravating circumstances included previous convictions for violent felonies, 490 U.S. at 639, which need not be found by a jury. Pet'r Br. 19 n.5 (citing *Blakely*, 542 U.S. at 301); *see also Jones v. United States*, 526 U.S. 227, 250-51 (1999) ("In *Hildwin*, a jury made a sentencing recommendation of death, thus necessarily engaging in the factfinding required for imposition of a higher sentence . . . .").

("Any argument that the Constitution requires that a jury impose the sentence of death . has been soundly rejected by prior decisions of this Court."); *Cabana v. Bullock*, 474 U.S. 376, 385 (1986), *overruled in part on other grounds*, *Pope v. Illinois*, 481 U.S. 497, 503 n.7 (1987).

Hurst contends the Court should overturn this precedent and establish a rule never before recognized. But abandoning precedent requires a substantial showing even in constitutional cases, *United States v. Int'l Bus. Machs. Corp.*, 517 U.S. 843, 856 (1996), and Hurst offers far less. According to Hurst, "history, current practice, and independent judgment" support overruling *Spaziano*. Pet'r Br. 26. None does.

a. First, Hurst's recounting of the jury's historical role in sentencing mostly works against him. Hurst acknowledges that in the country's early years, juries could determine sentences only because the law assigned fixed penalties for convictions, and juries determined guilt. *Id.* at 27; *see also Apprendi*, 530 U.S. at 479 (criminal law of the latter eighteenth century typically "prescribed a particular sentence for each offense"). Any "discretion" those early juries had to avoid death sentences, therefore, came not from law but from juries' disregarding law. *See Woodson v. North Carolina*, 428 U.S. 280, 293 (1976) (joint opinion of Stewart, Powell, Stevens, JJ.) ("At least since the Revolution, American jurors have, with some regularity, disregarded their oaths and refused to convict defendants where a death sentence was the automatic consequence of a guilty verdict."). That type of "discretion"—which actually survives in modern practice;

juries can still disregard instructions and convict of a lesser offense or acquit, John H. Langbein, *The Origins of Adversary Criminal Trial* 58 (2003)—cannot support a constitutional rule that only juries can impose death sentences.

Besides, after reviewing much of the same history Hurst details, the Court in *Apprendi* made "clear that nothing in this history suggests that it is impermissible for *judges* to exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing a judgment within the range prescribed by statute." 530 U.S. at 481 (emphasis added); *see also id.* ("[B]oth before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion.") (quoting *Williams v. New York*, 337 U.S. 241, 246 (1949)).[14]

b. As to *current* practice, Hurst notes that 27 of the 31 death penalty States have jury sentencing, which he says shows a "consensus" that jury sentencing is "the norm." Pet'r Br. 29. But his numbers do not meaningfully differ from those in *Spaziano*, in which the Court acknowledged that "30 out of 37" death penalty jurisdictions give the decision to the jury. 468 U.S. at 463. The Court also observed that "[b]esides Florida, the only States that allow a judge to override a jury's recommendation of life are Alabama and Indiana." *Id.* at 463 n.9; *cf.* Pet'r Br. 29 ("Only Florida, Alabama, Delaware, and Montana leave the final sen-

[14] While *Apprendi* was not a capital case, *Williams* was, and the Court undertook its historical analysis in that context.

tencing decision to the court."). Yet the Court rejected any argument that this "majority view" invalidated Florida's system. *Spaziano*, 468 U.S. at 464.[15]

Moreover, the consensus Hurst argues is not the type of consensus that could command change in Florida. In *Atkins*, *Roper*, and *Woodson*,[16] the Court's decisions unquestionably worked to the defendants' advantage, by either narrowing the class of individuals eligible for the death penalty (*Atkins*, *Roper*) or prohibiting mandatory death sentences (*Woodson*).[17] Judge sentencing and jury sentencing, on the other hand, are two procedural options, with neither obviously "more evolved" than the other. No capital defendant is better off with a rule that allows (rather than precludes) the execution of the intellectually disabled or juveniles, or a rule that imposes a mandatory death sentence upon conviction. Yet some defendants receive a more lenient sentence from a judge than from a jury. *See infra* at 35-36. Indeed, Florida implemented its procedure "specifically to provide the

---

[15] From a numbers standpoint, this is quite unlike cases where the Court has found a constitutionally meaningful consensus. *See, e.g.*, *Roper v. Simmons*, 543 U.S. 551, 565-66 (2005) (overruling *Stanford v. Kentucky*, 492 U.S. 361 (1989) after noting "significant" change in state practices and noting similar conclusion in *Atkins v. Virginia*, 536 U.S. 304 (2002)).

[16] *See Atkins*, 536 U.S. at 321; *Roper*, 543 U.S. at 578; *Woodson*, 428 U.S. at 305 (joint opinion of Stewart, Powell, Stevens, JJ.).

[17] Furthermore, in *Miller v. Alabama*, 132 S. Ct. 2455. 2470-71 (2012), the Court noted that the "typical" case in which the Court has "tallied legislative enactments," involves a categorical bar on a penalty based on the class of offender or the crime at issue. *Accord Graham v. Florida*, 560 U.S. 48, 60-62 (2010).

constitutional procedural protection required by *Furman*, thus providing capital defendants with more, rather than less, judicial protection." *Dobbert*, 432 U.S. at 294-95.

In this case, Hurst appears no better off either way: two judges and two juries all agreed he deserved death. But even if Hurst (or other States) prefers jury sentencing, Florida does not violate the Constitution by choosing otherwise.

c. Hurst also insists this Court's independent judgment should lead it to compel jury sentencing. He starts with the contention that retribution is the only constitutionally defensible justification for the death penalty, a point that is both wrong, *see Kennedy v. Louisiana*, 554 U.S. 407, 441 (2008) (identifying retribution and deterrence as legitimate justifications); *Glossip v. Gross*, 135 S. Ct. 2726, 2748 (2015) (Scalia, J., concurring) (noting that the death penalty also promotes incapacitation), and irrelevant. Even if retribution were the only rationale for capital punishment, "retribution is an element of all punishments society imposes, and there is no suggestion as to any of these that the sentence may not be imposed by a judge." *Spaziano*, 468 U.S. at 462. Therefore, "[i]t is entirely fitting for the moral, factual, and legal judgment of *judges and juries* to play a meaningful role in sentencing." *Barclay*, 463 U.S. at 950 (plurality opinion) (emphasis added).

Finally, any exercise of the Court's own judgment should consider the benefits of judicial sentencing. Again, imposing jury sentencing would simply change the decisionmaking process, with no obvious narrow-

ing result. "[F]or every argument why juries are more accurate factfinders, there is another why they are less accurate." *Schriro v. Summerlin*, 542 U.S. 348, 356 (2004) (noting that juries may become confused over legal standards or be influenced by emotion). Indeed, the Court earlier recognized that "it would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases." *Proffitt*, 428 U.S. at 252 (joint opinion of Stewart, Powell, Stevens, JJ.).

Many defendants benefit from the "second chance" Florida's hybrid system affords. Jason Tucker, for example, sexually assaulted and strangled a woman. *Tucker v. State*, 987 So. 2d 717, 718 (Fla. Dist. Ct. App. 2008). His victim, found dead on the floor of a sauna, had her neck cut, her face battered, her ribs broken, and suffered "injuries to her genitalia and bowel." *Id.* A jury convicted Tucker of both premeditated first-degree murder and sexual battery with great force. *Id.* Undoubtedly affected by the horror of the crimes, the jury recommended death. *Id.* at 720. But the judge overrode that recommendation, choosing life instead. *Id.* Tucker's case was not alone. *See, e.g.*, *Johnson v. State*, 100 So. 3d 1158, 1159 (Fla. Dist. Ct. App. 2012) (noting that judge overrode jury's death recommendation); *Barber v. State*, 4 So. 3d 9, 11 (Fla. Dist. Ct. App. 2009) (same). In fact, between 1974 and 2011, at least 88 defendants received life

sentences overriding jury recommendations. *See* Radelet, 2011 Mich. St. L. Rev. at 812-13.[18]

Finally, by entrusting the decision to a judge and requiring detailed written findings, Florida's system provides for more effective appellate review, allowing other defendants to receive life sentences after the Florida Supreme Court overturns a death sentence. *See supra* Part I.C.2.

Even if the merits were not clear on this issue, stare decisis would compel the same result. Stare decisis is a "foundation stone of the rule of law," *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2036 (2014), and "has added force" when "overturning a precedent would require 'States to reexamine [and amend] their statutes," *Harris v. Quinn*, 134 S. Ct. 2618, 2652 (2014) (Kagan, J., dissenting) (quoting *Hilton v. S.C. Pub. Rys. Comm'n*, 502 U.S. 197, 202-03 (1991)). Indeed, as Justice Kennedy's concurrence in *Ring* itself recognized, "the States' settled expectations deserve [this Court's] respect." 536 U.S. at 613 (Kennedy, J., concurring). There is no special justification here, and the Court should reaffirm its view that "[t]he decision whether a particular punishment—even the death penalty—is appropriate in any

---

[18] Notably, in the federal system, "judges are far more likely to acquit than juries." Hon. Alex Kozinski, Preface, *Criminal Law 2.0*, 44 Geo. L.J. Ann. Rev. Crim. Proc. iii, xviii (2015) (citing Andrew D. Leopold, *Why Are Federal Judges so Acquittal Prone?*, 83 Wash. U. L.Q. 151, 151 (2005)). One study showed that over one 14-year period, the conviction rate was 84% for jury trials and 55% for bench trials. *See id.*

given case is not one required to be made by a jury." *Cabana*, 474 U.S. at 385.

3. The Constitution Affords States Flexibility in the Administration of their Death Penalty Systems.

None of this is to say that Florida's way is the only way. The Court has "often recognized that there are many constitutionally permissible ways in which States may choose to allocate capital sentencing authority." *Espinosa*, 505 U.S. at 1082 (per curiam); *accord Kansas v. Marsh*, 548 U.S. 163, 173-74 (2006) (noting that if state rationally narrows class of death-eligible defendants and provides for individualized sentencing determination, it "enjoys a range of discretion in imposing the death penalty"); *Harris*, 513 U.S. at 510 ("[T]he Eighth Amendment is not violated every time a State reaches a conclusion different from a majority of its sisters over how best to administer its criminal laws.") (quoting *Spaziano*, 468 U.S. at 464); *Spaziano*, 468 U.S. at 464 ("[W]e are unwilling to say that there is any one right way for a State to set up its capital sentencing scheme.").

This flexibility, often recognized in the context of Eighth Amendment claims, applies to the Sixth Amendment as well. In *Oregon v. Ice*, for example, the Court rejected a Sixth Amendment claim based in part on "States' interest in the development of their penal systems, and their historic dominion in this area." 555 U.S. 160, 170 (2009). The Court continued:

> Beyond question, the authority of States over the administration of their criminal

> justice systems lies at the core of their sovereign status. We have long recognized the role of the States as laboratories for devising solutions to difficult legal problems. This Court should not diminish that role absent impelling reason to do so.

Id. at 170-71 (citations omitted). Therefore, although Oregon does not follow other States' "prevailing pattern" in sentencing, "the Sixth Amendment does not exclude Oregon's choice." *Id.* at 164.

In *Ring* itself, the Court recognized the range of State choices in determining jury involvement in death sentencing. The Court identified three types of capital sentencing states: those that generally allowed jury sentencing, those (including Arizona) that "commit[ted] both capital sentencing factfinding and the ultimate sentencing decision entirely to judges," and those (Florida and three other States) that had "hybrid systems, in which the jury renders an advisory verdict but the judge makes the ultimate sentencing determination." *Ring*, 536 U.S. at 608 n.6.[19] Yet the

---

[19] Hurst claims these three other states—Alabama, Delaware, and Indiana—modified their systems after *Ring*, implying that they were invalid. Pet'r Br. 25. Even if these states' decisions were relevant, the story is more complicated. Both Delaware and Alabama retained judge sentencing, which Hurst here argues is unconstitutional. The states have made clear that a jury finding is needed for the narrowing prong, bringing their systems more in line with Florida's. *See Ortiz v. State*, 869 A.2d 285, 305 (Del. 2005) ("[W]e adhere to our holding in *Brice* [cited by Hurst] that Delaware's hybrid form of sentencing, allowing the jury to find the defendant death eligible and then allowing a judge to impose the death penalty [comports with] *Apprendi* and *Ring*."); *Ex Parte Waldrop*, 859 So. 2d 1181, 1187-89 (Ala. 2002).

Court never suggested that compliance with *Ring* mandated a one-size-fits-all solution. *Cf. id.* at 612-13 (Scalia, J., concurring) (outlining how "[t]hose States that leave the ultimate life-or-death decision to the judge may continue to do so "); *id.* at 613 (Kennedy, J., concurring) (noting that "*Apprendi* can be read as leaving in place many reforms designed to reduce unfairness in sentencing"). Florida's hybrid system fits comfortably within the discretion the Constitution allows.

II. HURST'S SENTENCE COMPLIED WITH THE SIXTH AND EIGHTH AMENDMENTS IN LIGHT OF *RING*.

Whatever arguments Hurst makes in the abstract about Florida's system, Hurst's own sentencing fully complied with *Ring*. Hurst conceded the existence of aggravating circumstances, and two juries found them.

Even if there were error, it was harmless. "[M]ost constitutional errors can be harmless," *Arizona v. Fulminante*, 499 U.S. 279, 306 (1991), including in the *Apprendi* context, *see Washington v. Recuenco*, 548 U.S. 212, 215 (2006); *see also Booker*, 543 U.S. at 231 (noting that "the procedural error in *Ring* might have been harmless because the necessary finding was implicit in the jury's guilty verdict"). The failure to submit the element of an offense to the jury is subject to the harmless-error rule, *see Neder v. United States*, 527 U.S. 1, 8-9 (1999), and Courts have affirmed on

---

Indiana, like Florida, recognizes that an aggravator may be found at the guilt phase, satisfying *Ring*. *See Clark v. State*, 808 N.E.2d 1183, 1196 (Ind. 2004) (collecting cases).

that basis even in death cases, *see, e.g.*, *United States v. Allen*, 406 F.3d 940, 947-48 (8th Cir. 2005) (applying *Neder* and concluding that failure to require grand jury finding on aggravator necessary for death sentence indictment was harmless error where grand jury unquestionably would have found aggravator if asked); *United States v. Robinson*, 367 F.3d 278, 286, 289 (5th Cir. 2004) (omission of aggravating factors justifying death sentence from indictment was harmless error where no rational grand jury would not find aggravator).

In this case, the evidence of robbery was overwhelming, and there is no dispute that the murder was committed during a robbery. *See supra* at 8, 9, 12. No rational jury would have concluded otherwise. *Cf. Rose v. Clark*, 478 U.S. 570, 580-81 (1986) (holding erroneous jury instruction can be harmless because "no rational jury could find that the defendant committed the relevant criminal act but did not [satisfy the inherent element]"), *overruled in part on other grounds*, *Brecht v. Abrahamson*, 507 U.S. 619, 630, 638 (1991). Indeed, had the Florida Supreme Court found insufficient evidence of premeditation, it would have affirmed the conviction as felony murder, because of the robbery. *Cf. Mungin v. State*, 689 So. 2d 1026, 1029-30 (Fla. 1995) (citing *Griffin v. United States*, 502 U.S. 46 (1991)). If the Court finds error, it should determine that "on the whole record," any error is harmless beyond a reasonable doubt. *Id.* at 583. But for the reasons that follow, there was no error.

A. *Hurst Conceded the Existence of Aggravating Circumstances.*

Ring does not require jury findings on facts defendants have admitted. *See Blakely*, 542 U.S. at 303 ("[T]he 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant."); *accord Cunningham v. California*, 549 U.S. 270, 274 (2007). Because Hurst has admitted facts sufficient to justify his sentence, his *Ring* claim cannot succeed.[20]

---

[20] This Court has not specified what constitutes an "admission" for these purposes, and lower courts have disagreed to some extent. *Compare State v. Brown*, 129 P.3d 947, 952 (Ariz. 2006) (noting that "neither *Blakely* nor any of the Supreme Court's *Apprendi*-line of cases explain the context in which an 'admission' by a defendant will satisfy the defendant's Sixth Amendment right" and finding "admission" during sentencing hearing did not suffice) with *United States v. Revels*, 455 F.3d 448, 450 (4th Cir. 2006) ("Admissions may take a variety of forms, including guilty pleas and stipulations, a defendant's own statements in open court, and representations by counsel. However a defendant admits to facts, they may serve once admitted as the basis for an increased sentence without being proved to a jury beyond a reasonable doubt.") (citing *Blakely*; citations omitted). Whatever the limits, an unambiguous statement in an appellate brief should suffice. Independently, though leading to the same result, such a statement is a waiver of any Sixth Amendment right. *See United States v. Cunningham*, 405 F.3d 497, 503-04 (7th Cir. 2005).

The State did not raise Hurst's admissions in its brief in opposition. Hurst's petition principally focused on an intellectual disability claim he does not present here. He also presented five *Ring*-related claims, several of which his concession would not affect (*e.g.*, whether *Ring* requires a jury "role in determining the

Hurst acknowledged the murder was in the course of a robbery. *See supra* at 8, 9, 12. In his sentencing memorandum following the initial jury verdicts, he admitted that "[t]he State established two aggravating circumstances during the penalty phase trial"—that the crime was especially heinous, atrocious or cruel and that it was committed in the course of a robbery. 2000 ROA R.451.[21] And the trial court found in the original sentencing order that robbery was demonstrated beyond a reasonable doubt. 2000 ROA R.483. Hurst never challenged those findings in any appeal, and the Florida Supreme Court recognized that the aggravators were clearly demonstrated. JA188, 189; *see also* JA36-37. Hurst presented no evi-

---

factual issue" of intellectual disability), as well as a claim the concession does affect (whether "the jury's findings of aggravating factors need [] be unanimous"). Pet. i. Under these circumstances, the Court should exercise its discretion and consider the argument. *See, e.g.*, *Jones v. United States*, 527 U.S. 373, 397 n.12 (1999) (plurality opinion) (exercising discretion to consider issue not raised in government's brief in opposition because it was "essential to an intelligent resolution" of question presented); *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 75 n.13 (1996).

[21] Although Florida courts recognize that a new capital sentencing proceeds on a "clean slate," *see Preston v. State*, 607 So. 2d 404, 408 (Fla. 1992), that does not mean that the Sixth Amendment precludes reliance on Hurst's admissions in the first penalty phase. The Florida Supreme Court's decision invalidating the first sentencing turned on the failure to discover and introduce mitigating evidence to weigh against the admitted aggravating circumstances. *See supra* at 10. The Court found "the fact that this murder was especially heinous, atrocious or cruel [and] that the robbery aggravator clearly exists." JA189. Regardless, Hurst's concessions persisted even after the initial resenresentencing proceeding, including in his most recent Florida Supreme Court briefing.

dence at resentencing calling into question whether the murder was committed during a robbery.[22]

Most recently, in his brief to the Florida Supreme Court in this proceeding, Hurst again conceded the existence of the statutory aggravators, focusing his appellate efforts on offsetting mitigation evidence and proportionality:

> Hurst does not challenge the trial court's findings that the murder was committed during the course of a robbery, and it was especially heinous, atrocious, or cruel. He also does not question the seriousness of these aggravators. [T]he aggravators the court found, as serious as they may be, do not, as we shall see, so far outweigh the mitigation that a death sentence is proportionally justifiable.
>
> The facts of this murder force the conclusion that this was "a robbery gone bad" homicide for which a death sentence is most likely unwarranted.

---

[22] Hurst contends he "invited the jury to question whether there was reasonable doubt" as to the robbery. Pet'r Br. 9 (citing JA978-80). That does not appear so, but to the extent he suggested someone else committed the murder and robbery, a unanimous jury convicted Hurst of the murder, and Hurst has never suggested that the murderer was not the robber. Florida does not permit lingering doubt evidence about guilt during the penalty phase. *See Way v. State*, 760 So. 2d 903, 916-18 (Fla. 2000).

Appellant's Initial Br. 24-25 (No. SC12-1947) (citations omitted). He did go on to argue that a jury finding should have been required: "Specifically, although the court found Hurst had committed the murder during the course of the robbery, no jury had ever convicted him of that offense." *Id.* at 65. But Florida does not require a *conviction* to satisfy the course-of-a-robbery aggravator. *See generally Brown v. State*, 721 So. 2d 274, 282 (Fla. 1998); *cf. Brown v. State*, 473 So. 2d 1260, 1266-67 (Fla. 1985) (addressing course-of-a-rape aggravator). And no conviction—or even jury finding—is necessary in light of Hurst's concession.

B. *A Jury Found Beyond a Reasonable Doubt the Existence of an Aggravator.*

Putting aside Hurst's concessions and the harmless-error analysis, the jury (two juries, in fact) found beyond a reasonable doubt the existence of at least one aggravator. Hurst disputes whether the jury's death recommendation "impl[ied] the finding required by *Ring*." Pet'r Br. 31. In fact, the juries' conclusions more than implied the finding; they established it.

Both juries were instructed that they could not return a death recommendation without finding at least one aggravator established beyond a reasonable doubt. JA210-13; 2000 ROA Tr. 984-86. The Court must presume that juries will follow instructions, *see Weeks v. Angelone*, 528 U.S. 225, 234 (2000), and Hurst has not suggested that they did not. Therefore, the juries' death recommendations necessarily included a finding of an aggravating circumstance. In *Jones*, 526 U.S. 227, the Court recognized just that. The Court explored *Hildwin v. Florida* (without question-

ing its vitality), and explained that "[i]n *Hildwin*, a jury made a sentencing recommendation of death, thus necessarily engaging in the factfinding required for imposition of a higher sentence, that is, the determination that at least one aggravating factor had been proved." *Id.* at 250-51;[23] *accord Steele*, 921 So. 2d at 546. Far removed from *Ring*, in which the court made its findings "sitting without a jury," 536 U.S. at 609, Hurst's case involved a jury necessarily finding at least one aggravating circumstance.

Hurst separately contends that *Ring* requires particularized jury findings about specific aggravators. Nothing in *Ring* requires the jury to provide more specificity on an aggravating circumstance (a "functional element") than on any other element of any crime. *Ring* therefore did not disturb the Court's earlier precedents that explicitly reject claims about juror specificity. *See Espinosa*, 505 U.S. at 1080 (per curiam) (upholding system while noting "[t]he verdict does not include specific findings of aggravating and mitigating circumstances, but states only the jury's

---

[23] Seeking to minimize *Jones v. United States*, Hurst contends that its statement about *Hildwin* did not express "the Court's considered, authoritative judgment." Pet'r Br. 33. But he relies on the Court's statement in *Walton*—nine years before *Jones*—that "[a] Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona." Pet'r Br. 18, 23 (quoting *Walton v. Arizona*, 497 U.S. 639, 648 (1990)). *Jones* "foreshadowed" *Apprendi*, 530 U.S. at 476, and *Ring* later recognized the differences between the two states' systems, 536 U.S. at 608 n.6; *see also supra* at 38. If either statement is incorrect, it is the earlier statement in *Walton*.

sentencing recommendation."); *Hildwin*, 490 U.S. at 638 (rejecting claim that Sixth Amendment precludes death sentence "without a specific finding by the jury that sufficient aggravating circumstances exist").

Nor does *Ring* require—as Hurst suggests—that the jury agree on a particular aggravator. The Constitution does not require jury agreement on a particular theory of murder, *see Schad v. Arizona*, 501 U.S. 624 (1991) (plurality opinion); it likewise does not require jury agreement on a particular theory of aggravation. In *Schad*, the jury convicted the defendant of first-degree murder without specifying whether it found premeditated murder or felony murder. *Id.* at 629-30. The Court rejected petitioner's contention that the Constitution required unanimous jury agreement on a single theory. *Id.* at 629-30; *see also id.* at 650 (Scalia, J., concurring in part and concurring in the judgment) ("When a woman's charred body has been found in a burned house, and there is ample evidence that the defendant set out to kill her, it would be absurd to set him free because six jurors believe he strangled her to death (and caused the fire accidentally in his hasty escape), while six others believe he left her unconscious and set the fire to kill her.").

What mattered in *Schad* was how Arizona viewed its own laws, and "under Arizona law neither premeditation nor the commission of a felony is formally an independent element of first-degree murder; they are treated as mere means of satisfying a mens rea element of high culpability." *Id.* at 639. Subject to due process limitations, *cf. id.* at 651 (Scalia, J., concurring in part and concurring in the judgment) (noting due process would not allow "an indictment charging

the defendant assaulted either X on Tuesday or Y on Wednesday"), the Court would not interfere with the States' authority to define elements of crimes.

Florida law does not define its statutory aggravators as elements of separate crimes—the presence of *an* aggravator is the element. *See Steele*, 921 So. 2d at 544 ("[T]he finding of 'an element of a greater offense' would be that at least one aggravator exists—not that a specific one does."); *see also Sattazahn*, 537 U.S. at 112 (opinion of Scalia, J.) (noting that in capital sentencing, "'murder plus one or more aggravating circumstances' is a separate offense from 'murder' *simpliciter*."); *see also Richardson v. United States*, 526 U.S. 813, 817 (1999) (noting where an element of robbery is the threat of force, jurors need not agree on whether the defendant used a gun or knife to create the threat).

This approach is consistent with the narrowing requirement imposed on the States—the requirement that states limit death sentences to those more culpable than other murderers. *See Lowenfield*, 484 U.S. at 244. When the jury determines that the defendant satisfies an aggravator, even if it does not agree which one, it has determined the defendant is sufficiently culpable for the death penalty. Whether Hurst's enhanced culpability flowed from the robbery or from the heinous nature of the murder (or both), what matters is that the jury found enhanced culpability. *See Schad*, 501 U.S. at 644 (plurality opinion) (finding that moral equivalence between premeditated murder and murder in the course of a robbery "could reasonably be found"); *see also Reed v. Quarterman*, 504 F.3d 465, 482 (5th Cir. 2007) (applying *Schad* and holding

that "a court could reasonably find a moral equivalence between murder in the course of robbery and murder in the course of attempted rape."); *Jeffries v. Blodgett*, 5 F.3d 1180, 1195 (9th Cir. 1993) ("[I]t is irrelevant whether the jurors agreed upon the underlying 'crime' or 'scheme' as being murder or theft. Under the Washington statute, the specific crime is not an element The findings of a crime or scheme are merely alternative means of finding aggravated first degree murder.") (citations omitted) (citing *Schad*).

C. *The Sentence Was Not Otherwise Unconstitutional.*

Hurst's alternative arguments challenging his sentence assume that "the jury's advisory verdict satisfied *Ring*," Pet'r Br. 34, and are not properly raised here. The issues of jury instructions and jury unanimity were not presented in *Ring*, not discussed in *Ring*, and are unable to render Florida's sentencing system unconstitutional "in light of *Ring*." Moreover, Hurst's *Caldwell* argument was not preserved. Hurst did not raise it in the Florida Supreme Court or in his petition to this Court. *See supra* Part I.D.1. Nor did he offer a contemporaneous objection to the jury instruction. JA950-53, 956. *See Dugger v. Adams*, 489 U.S. 401, 408 (1989) (finding *Caldwell* argument waived under Florida law). If the Court nonetheless addresses these arguments, it should reject them on the merits.

1. The Jury Instructions Did Not Mislead.

Hurst contends that if his sentence turned on the advisory jury's verdict, then the sentence would violate the Eighth Amendment because the instructions misleadingly "minimize[d] the jury's sense of responsibility for determining the appropriateness of death." Pet'r Br. 35 (citing *Caldwell v. Mississippi*, 472 U.S. 320 (1985)). To succeed with a *Caldwell* claim, "a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law." *Dugger*, 409 U.S. at 407-08. Hurst therefore must show that the challenged remarks "violated state law," *id.* at 408, yet it is undisputed that the instructions followed Florida's standard jury instructions, which the Florida Supreme Court has repeatedly upheld against *Caldwell* claims. *See, e.g.*, *Pagan v. State*, 29 So. 3d 938, 959 (Fla. 2009) (collecting cases); *Globe v. State*, 877 So. 2d 663, 673-74 (Fla. 2004).

Moreover, "*Caldwell* is relevant only to certain types of comment—those that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision." *Darden v. Wainwright*, 477 U.S. 168, 183 n.15 (1986); *accord Romano v. Oklahoma*, 512 U.S. 1, 9 (1994) ("The infirmity identified in *Caldwell* is simply absent in this case: Here, the jury was not affirmatively misled regarding its role in the sentencing process."). In Hurst's case, the trial court told the jury that "the final decision as to which punishment shall be imposed is the responsibility of the judge," JA985, which was true. And it told the jury that its "recommendation must be given great weight

and deference," JA985, which was also true. Hurst argues that the jury would not have understood that its verdict contained an implicit finding that the State established one or more aggravating factors, *see* Pet'r Br. 35-36, but even if true, nothing in *Caldwell* requires the level of specificity Hurst urges. The instructions explained that the court would give "great weight" and deference to the jury's recommendation, and jurors surely recognized the consequence of a vote for death. Nothing in the instructions suggested the jury would not "recognize[] the gravity of its task [or] proceed[] with the appropriate awareness of its 'truly awesome responsibility.'" *Caldwell*, 472 U.S. at 341. Instead, the instructions reminded the jury of "the gravity of these proceedings" and implored careful consideration, "realizing that human life is at stake." JA993.

2. The Sentence Did Not Violate the Sixth or Eighth Amendment Based on the Possibility of a Simple Majority Finding.

Hurst next argues that even if the jury recommendation could provide the factual finding necessary to establish death eligibility, only a unanimous vote could suffice. This argument assumes that the eligibility was not established otherwise, and Hurst does *not* specifically argue that the Constitution requires unanimous jury recommendations when aggravators are otherwise proven or admitted.[24] What he does argue is that the nonunanimous (7-5) vote on his death

---

[24] Unlike his merits brief, Hurst's petition argued that allowing nonunanimous recommendations *and* nonunanimous jury findings were both unconstitutional. Pet. i, 23.

recommendation was insufficient.[25] Yet as he acknowledges, the Court has long permitted nonunanimous verdicts in state courts. Pet'r Br. 38; *see also Apodaca v. Oregon*, 406 U.S. 404 (1972) (plurality) (rejecting Sixth Amendment challenge to system allowing for conviction on 10-2 verdict); *Johnson v. Louisiana*, 406 U.S. 356 (1972) (rejecting due process claim against 9-3 verdict); *but see Burch v. Louisiana*, 441 U.S. 130 (1979) (holding that if State employs six-person jury, unanimity is required). Moreover, while Hurst argues the history and utility of unanimous jury verdicts generally, the issue here is whether unanimity is required in the specific context of Florida's system, which includes judicial sentencing and strict appellate review as additional safeguards.

a. In *Apodaca*, the Court recognized that the Sixth Amendment does not require rigid adherence to the common law, but allows States to deviate from the traditional twelve-member, unanimous jury, so long as they preserve the jury's essential feature: the "in-

---

[25] The verdict form did not separately indicate findings on aggravators. JA217. Although it is certain that all jurors recommending death necessarily found an aggravator, *see supra* at 11 (quoting jury instructions), an individual juror's vote for life does not demonstrate that juror's determination that no aggravating circumstance was proven. The juror may have found there was an aggravator but found it outweighed by the mitigating circumstances. For example, in a reported decision involving special verdict forms used, the jury unanimously found two aggravators but the jury only recommended death by a vote of 7 to 5. *See Lebron v. State*, 982 So. 2d 649, 656 & n.4 (Fla. 2008). And because many, if not most defendants sentenced to death in Florida had another indisputable aggravator, *see supra* Part I.B, the *Lebron* case is not an isolated incident.

terposition between the accused and his accuser of the commonsense judgment of a group of laymen." 406 U.S. at 410 (plurality opinion). Because unanimity "does not materially contribute to the exercise of this commonsense judgment," the Court affirmed a 10-2 jury verdict, *id.* at 410-11,[26] and in *Johnson*, issued the same day, expressed its general hesitation to "overturn a considered legislative judgment that unanimity is not essential to reasoned jury verdicts," 406 U.S. at 362.

Hurst nonetheless argues that a long history of unanimity proves its need, and that Florida's "outlier" status invalidates Florida's system. But *Apodaca* reviewed that same history and allowed nonunanimous felony jury verdicts even though Louisiana and Oregon were the only States using them at the time. *See* 406 U.S. at 407-10 & nn.2-3; *Duncan v. Louisiana*, 391 U.S. 145, 158 n.30 (1968). And these holdings followed cases where the Court rejected challenges based on jury size, despite the similar historical tradition of 12-person juries. *See Williams v. Florida*, 399 U.S. 78, 102-03 (1970).

Hurst also presents what he views as practical problems with nonunanimous juries: shorter deliberations, fewer polls, and less frequent hung juries. Pet'r Br. 44. And to be sure, the Court has addressed functional concerns about deliberations in Sixth

---

[26] Justice Powell, in a single opinion concurring in *Johnson* and concurring in the judgment in *Apodaca*, limited this result to state courts. He concluded that the Sixth Amendment required unanimity, but the Fourteenth Amendment does not. 406 U.S. 366, 370-73 (opinion of Powell, J.).

Amendment cases when jury *size* was an issue. In *Ballew v. Georgia*, for example, the Court found five jurors too few to effectively deliberate, as they would be less representative and potentially unable to effectively recall the facts of the case. 435 U.S. 223, 232-39 (1978). One year later, the Court invalidated a 5-1 jury not because of "any inherent vice in nonunanimity," but primarily because of the effect of nonunanimity on the otherwise constitutional minimum jury size of six. *See McKoy v. North Carolina*, 494 U.S. 433, 468 (1990) (Scalia, J., dissenting) (analyzing *Burch*, 441 U.S. 130).[27]

Even accepting that a unanimity requirement produces *different* deliberations (although one source Hurst quotes acknowledges those difference are "small" at best, Dennis J. Devine et al., *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 Psychol. Pub. Pol'y & L. 622, 669 (2001)), Hurst has not shown that unanimity fosters *better* deliberations. In fact, a qualitative study he cites suggests that jurors often change their votes out of strong fears of the "failure" of a hung jury, coupled with other psychological pressures, rather than from any positive effect of the deliberative process. Scott E. Sundby, *War and Peace in the Jury Room: How Capi-*

---

[27] Hurst cites language from Justice Kennedy's separate concurrence in the *McKoy* judgment, which recognizes the virtue of unanimity in the abstract. *See* Pet'r Br. 49-50. But the case involved the distinct question of whether a state could require a unanimous finding that a mitigating circumstance exists. The case did not address any need for unanimity as to aggravating circumstances, the continuing vitality of *Apodaca*, or any other question potentially at issue in Hurst's case.

tal Juries Reach Unanimity, 62 Hastings L.J. 103, 118, 131, 141-45 (2010).[28] And to the extent Hurst suggests that jurors considering the uniquely grave question of a death sentence would not give careful consideration just because unanimity is not required, his suggestion is contrary to the Court's "longstanding perceptions about jury behavior," even with much lower stakes.[29] *See Johnson*, 406 U.S. at 361-62 (criticizing notion that jury would "vote to convict even if

---

[28] Hurst cites this study's claim that a first-ballot simple majority favoring death "almost invariably portends" an eventual life verdict, Pet'r Br. 44-45 (citing Sundby, 62 Hastings L.J. at 107-08), but the only first-ballot simple majority for death identified in the study resulted in a death verdict, Sundby, 62 Hastings L.J. at 108 n.9. The study includes results from a review of South Carolina juries reporting that no case (in the sample of just 7) with six to eight first-ballot death votes led to a death verdict. Theodore Eisenberg et al., *Forecasting Life and Death: Juror Race, Religion, and Attitude Toward the Death Penalty*, 30 J. Legal. Stud. 277, 303 & tbl. 7 (2001) (cited in Sundby, 62 Hastings L.J. at 107-08). Even if such a small sample could yield meaningful results, South Carolina requires unanimity only for a death verdict, not for a life verdict, *see* Sundby, 62 Hastings L.J. at 108 n.11, making it an unfit comparator to traditional unanimity requirements

[29] The American Bar Association amicus brief largely relies on these same studies (at 15-16), but the brief also cites a 2006 ABA report, which in turn cites data from surveys of Florida jurors. *See id.* at 14-15 (citing ABA, *Evaluating Fairness and Accuracy In State Death Penalty Systems: The Florida Death Penalty Assessment Report* (2006)). Partly in response to the issues of juror confusion cited in the ABA's report, the Florida Supreme Court modified the standard jury instructions for capital cases. *See In re Standard Jury Instructions in Criminal Cases-Report No. 2005-2*, 22 So. 3d 17, 19, 22 (Fla. 2009). It is these modified instructions that Hurst's resentencing jury received. *Compare id.* at 27-36, *with* JA207-16.

deliberation has not been exhausted and minority jurors have grounds for acquittal which, if pursued, might persuade members of the majority to acquit" without unanimity requirement).[30]

Regardless, stare decisis counsels against overturning *Apodaca*, which is now more than four decades old.[31] Reversing *Apodaca* would affect not just Florida, but also Oregon and Louisiana, both of whom have had their nonunanimous jury systems upheld. "Stare decisis has "added force when the legislature ha[s] acted in reliance on a previous decision." *Hilton v. S.C. Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991); *see also supra* at 36-37.

Hurst identifies no radical change of circumstances over the past four decades, and he does not argue that the rule has proved unworkable. Instead, he asks the Court to reverse *Apodaca* because Justice Powell's concurrence in the judgment (but not the plurality) relied on a theory of partial incorporation that differs from the Court's usual approach. The Court

---

[30] Hurst also points to fewer hung juries from nonunanimous verdicts, Pet'r Br. 44, but hung juries are generally no better for the defense than the prosecution. *Apodaca*, 406 U.S. at 411 & n.5.

[31] Hurst claims his proposed constitutional rule would not require overturning *Apodaca*, *see* Pet'r Br. 45, but all of his arguments address unanimity. Hurst does not say that history, empirical data, or any other source supports a rule that a 10-2 majority is sufficient but a 7-5 vote is not. And if Hurst were to argue that a 10-2 rule would satisfy the Sixth Amendment, he would have to explain why this Court should disregard the fact that the initial jury found, by at least 11 votes, the existence of at least one aggravating circumstance. *See supra* note 21.

has, however, already explained that reliance on partial incorporation is not a sufficient reason to disregard stare decisis. *McDonald v. City of Chicago*, 561 U.S. 742, 784-85 & n.30 (2010) (plurality opinion) (Bill of Rights guarantee not "fully binding" on states when "stare decisis counsels otherwise"), and the Court has consistently relied on *Apodaca* in the years since, *see, e.g.*, *Schad*, 501 U.S. at 634 (plurality opinion). Under these circumstances, Hurst has failed to provide the substantial showing, *see supra* at 31, 36, necessary to overturn *Apodaca*.

At any rate, the plurality opinion in *Apodaca* justifies the result. The historical reasons for unanimity are "shrouded in obscurity," and Congress rejected an earlier version of the Sixth Amendment that would have explicitly required unanimity and the "other accustomed requisites" for criminal trials. *Apodaca*, 406 U.S. at 407-11 & n.2. These factors support a functional, rather than reflexive, approach to the question of jury unanimity, and they show unanimity is not required. *See id.* at 410-11. Notably, this is the same approach that led the Court in *Williams* to conclude that twelve-person juries were not required, notwithstanding that they were standard at common law. 399 U.S. at 87-90, 98-100; *see also United States v. Gaudin*, 515 U.S. 506, 510 n.2 (1995) (noting that *Apodaca* plurality relied on "similar analysis" to the jury size decision in *Williams*).

b. Finally, Hurst argues that even if the Sixth Amendment does not require jury unanimity on the existence of an aggravating circumstance, the Eighth Amendment does. A nonunanimous aggravating circumstance finding cannot support a death sentence,

he contends, because it would diminish the reliability of the sentencing determination. Pet'r Br. 48. But Eighth Amendment reliability does not require jury determinations on aggravating circumstances at all, much less unanimous jury determinations. *See supra* at 34-35; *cf. Schriro*, 542 U.S. at 356. In *Spaziano*, the Court held that a judge's "independent review of the evidence" to make "findings regarding aggravating and mitigating circumstances" in the context of Florida's death penalty framework provided adequate safeguards under the Eighth Amendment. 468 U.S. at 466. *Ring*, which turned exclusively on the Sixth Amendment, 536 U.S. at 607, did not change that.[32]

Florida's rule is simply unlike the procedural rules the Court found to violate the Eighth Amendment, because those have favored death. For example, in *Beck v. Alabama*, the Court held that forcing the jury to choose between letting the defendant go free and convicting the defendant of a capital crime risked an unwarranted conviction and violated the Eighth Amendment. 447 U.S. 625, 637 (1980). Likewise, States cannot prevent individualized consideration of mitigating circumstances because that, too, "creates the risk that the death penalty will be imposed in

---

[32] Moreover, in both *Spaziano* and *Harris*, this Court held that, for Eighth Amendment purposes, a rule that does not have such an increased risk effect is fully constitutional even if the vast majority of states have taken a different approach. *See Harris*, 513 U.S. at 510 (noting the Court has "made clear that the 'Eighth Amendment is not violated every time a State reaches a conclusion different from a majority of its sisters over how best to administer its criminal laws.'") (quoting *Spaziano*, 468 U.S. at 464). Hurst's reference to other States' capital sentencing rules, Pet'r Br. 48-51, is therefore unhelpful.

spite of factors which may call for a less severe penalty." *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (plurality opinion). Florida's system presents no similar risks. Viewing Florida's system as a whole, any hypothetical enhanced risk from a majority verdict is more than offset by the additional protections described above. Accordingly, the Eighth Amendment no more prohibits Florida's death penalty framework than does the Sixth.[33]

* * *

Ring serves to ensure that a judge's findings alone will not determine a defendant's eligibility for the death penalty. In practice, Florida's sentencing system likewise ensures that a judge's findings alone will not determine a defendant's eligibility for the death penalty. In this case, the only finding necessary to make Hurst eligible for death was that there is at least one aggravating circumstance. The jury, the judge, and Hurst himself all agree there was. This does not violate *Ring*.

---

[33] Hurst argues that the errors he argues existed, *see* Pet'r Br. at 53 (identifying nonunanimity and alleging instruction error), together constitute cumulative error rendering his sentence unconstitutional. Pet'r Br. at 52. Hurst ignores the fact that the combination of Florida's sentencing approach in most cases benefits the defendant, *see supra* at 26-27, 35-36, and in the remaining cases play a minimal role if any, *see supra* Part I.B. Regardless, Hurst's argument fails because any error *in his particular case* is harmless. *See supra* at 39-40; *cf. McCleskey v. Kemp*, 481 U.S. 279, 308-09 (1987) (holding that statistical evidence of discrimination was insufficient to invalidate death sentence absent evidence that discrimination played a role in particular case).

Florida's capital sentencing scheme was constitutional before *Ring*, and it is constitutional in light of *Ring*.

CONCLUSION

The Court should affirm the Florida Supreme Court's decision.

Respectfully submitted,

PAMELA JO BONDI
Attorney General of Florida

CAROLYN M. SNURKOWSKI
Associate Deputy Attorney General

Office of the
Attorney General
PL-01, The Capitol
Tallahassee, Florida
32399

ALLEN WINSOR
Solicitor General
Counsel of Record
DENISE HARLE
RACHEL NORDBY
OSVALDO VAZQUEZ
Deputy Solicitors General

allen.winsor@myfloridalegal.com
(850) 414-3300

July 29, 2015

No. 14-7505

IN THE

Supreme Court of the United States

TIMOTHY LEE HURST,
Petitioner,

v.

FLORIDA,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

REPLY BRIEF FOR PETITIONER

NANCY A. DANIELS
PUBLIC DEFENDER
DAVID A. DAVIS
ASSISTANT PUBLIC DEFENDER
Leon County Courthouse
301 South Monroe Street
Suite 401
Tallahassee, FL 32301

MARK E. OLIVE
LAW OFFICES OF MARK E. OLIVE, P.A.
320 West Jefferson Street
Tallahassee, FL 32301

SETH P. WAXMAN
Counsel of Record
CATHERINE M.A. CARROLL
DAVID M. LEHN
FRANCESCO VALENTINI
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
seth.waxman@wilmerhale.com

ERIC F. FLETCHER
ALLISON TRZOP
WILMER CUTLER PICKERING HALE AND DORR LLP
60 State Street
Boston, MA 02109

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. FLORIDA'S CAPITAL SENTENCING SCHEME IS UNCONSTITUTIONAL UNDER *RING* 2

A. Florida's Scheme Violates The Sixth Amendment 2

B. Florida's Scheme Violates The Eighth Amendment 5

II. THE *RING* VIOLATION REQUIRES VACATUR OF HURST'S SENTENCE 7

A. Hurst Did Not Waive His Jury-Trial Right 7

B. The Advisory Verdict Did Not Imply The Necessary Findings 11

III. THE STATE'S DEFENSE OF FLORIDA'S CAPITAL SENTENCING SCHEME RAISES OTHER CONSTITUTIONAL PROBLEMS 14

A. The Jury Had No Sense Of Responsibility For Hurst's Sentence 15

B. The Jury Deliberated Under A Simple Majority Rule 16

C. Florida's Sentencing Scheme Subverted The Jury's Deliberative Function 19

CONCLUSION 20

TABLE OF AUTHORITIES

CASES

Page(s)

Aguirre-Jarquin v. *State*, 9 So. 3d 593 (Fla. 2009) 4, 12

Apodaca v. *Oregon*, 406 U.S. 404 (1972) 16, 17

Apprendi v. *New Jersey*, 530 U.S. 466 (2000) 6, 17

Arave v. *Creech*, 507 U.S. 463 (1993) 14

Bevel v. *State*, 983 So. 2d 505 (Fla. 2008) 13

Blakely v. *Washington*, 542 U.S. 296 (2004) 8

Brady v. *United States*, 397 U.S. 742 (1970) 8

Bryant v. *State*, 901 So. 2d 810 (Fla. 2005) 8

Burch v. *Louisiana*, 441 U.S. 130 (1979) 2, 14, 19, 20

Caldwell v. *Mississippi*, 472 U.S. 320 (1985) 15

Cheshire v. *State*, 568 So. 2d 908 (Fla. 1990) 4

Coday v. *State*, 946 So. 2d 988 (Fla. 2006) 1, 3, 12

College Savings Bank v. *Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999) 8

Combs v. *State*, 525 So. 2d 853 (Fla. 1988) 4, 15

Crawford v. *Washington*, 541 U.S. 36 (2004) 17

Delgado v. *State*, 162 So. 3d 971 (Fla. 2015) 2, 3

Engle v. *State*, 438 So. 2d 803 (Fla. 1983) 3

Espinosa v. *Florida*, 505 U.S. 1079 (1992) 4, 12

Florida v. *Nixon*, 543 U.S. 175 (2004) 7, 8, 10

Glossip v. *Gross*, 135 S. Ct. 2726 (2015) 7

TABLE OF AUTHORITIES—Continued

Page(s)

Gonzalez v. *State*, 136 So. 3d 1125 (Fla. 2014) 3

Grossman v. *State*, 525 So. 2d 833 (Fla. 1988) 4

Hildwin v. *Florida*, 490 U.S. 638 (1989) 5

Johnson v. *Louisiana*, 406 U.S. 356 (1972) 16, 17, 18

Johnson v. *State*, 994 So. 2d 960 (Fla. 2008) 8

Johnson v. *United States*, 135 S. Ct. 2551 (2015) 5

Jones v. *United States*, 527 U.S. 373 (1999) 17

Lambrix v. *Singletary*, 520 U.S. 518 (1997) 4

Maynard v. *Cartwright*, 486 U.S. 356 (1988) 14

McKoy v. *North Carolina*, 494 U.S. 433 (1990) 17, 19

Mills v. *Maryland*, 486 U.S. 367 (1988) 18, 19

Preston v. *State*, 607 So. 2d. 404 (Fla. 1992) 10

Proffitt v. *Florida*, 428 U.S. 242 (1976) 13

Richardson v. *United States*, 526 U.S. 813 (1999) 13

Ring v. *Arizona*, 536 U.S. 584 (2002) 1, 2, 6, 7, 11

Russ v. *State*, 73 So. 3d 178 (Fla. 2011) 3, 4

Schad v. *Arizona*, 501 U.S. 624 (1991) 12, 13

Southern Union Co. v. *United States*, 132 S. Ct. 2344 (2012) 8

Spaziano v. *Florida*, 468 U.S. 447 (1984) 19

State v. *Fleming*, 61 So. 3d 399 (Fla. 2011) 10

State v. *Steele*, 921 So. 2d 538 (Fla. 2005) 3, 12

State v. *Upton*, 658 So. 2d 86 (Fla. 1995) 8

TABLE OF AUTHORITIES—Continued

Page(s)

Tedder v. *State*, 322 So. 2d 908 (Fla. 1975) 4

Tucker v. *State*, 559 So. 2d 218 (Fla. 1990) 8

Walton v. *Arizona*, 497 U.S. 639 (1990) 5

Williams v. *New York*, 337 U.S. 241 (1949) 6

Williams v. *State*, 967 So. 2d 735 (Fla. 2007) 3

Witherspoon v. *Illinois*, 391 U.S. 510 (1968) 6

Woodson v. *North Carolina*, 428 U.S. 280 (1976) 6

STATUTES AND RULES

Fla. Stat.
§ 775.082 ..... 2, 3
§ 921.141 ..... 2, 3, 9, 13, 14

S. Ct. R. 15.2 7

OTHER AUTHORITIES

Devine, Dennis J., et al., *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 Psychol. Pub. Pol'y & L. 622 (2001) 18

2 Story, Joseph, *Commentaries on the Constitution of the United States* (1833) 17

IN THE

Supreme Court of the United States

No. 14-7505

TIMOTHY LEE HURST,
Petitioner,

v.

FLORIDA,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Because Florida law relegates capital juries to an advisory role at sentencing and conditions eligibility for the death penalty on the findings of the judge alone, the Florida system—and Timothy Hurst's sentence—are unconstitutional. *Ring* v. *Arizona*, 536 U.S. 584 (2002).

The State stakes its response on two propositions, neither of which is correct. First, it claims that Hurst conceded the existence of an aggravating factor. But Hurst never made such a concession and never effectuated a valid waiver of his Sixth Amendment rights.

Second, the State asserts that Florida capital juries make dispositive findings that establish eligibility for a death sentence, leaving to judges only a choice between alternative punishments authorized by the verdict. The Florida Supreme Court has repeatedly rejected that characterization. Florida law "does not require jury findings on aggravating circumstances." *Coday* v. *State*, 946 So. 2d 988, 1005 (Fla. 2006). A Florida defendant becomes eligible for death only if the sentenc-

ing proceeding "results in findings *by the court*," Fla. Stat. § 775.082(1) (emphasis added)—made after "independent analysis"—that aggravating circumstances exist and are not outweighed by mitigating factors. *Delgado* v. *State*, 162 So. 3d 971, 981 (Fla. 2015) (internal quotation marks omitted); Fla. Stat. § 921.141(3).

Moreover, the State's defense of Florida's sentencing scheme disregards the purpose of the jury-trial guarantee and its critical role in capital sentencing. The constitutional right to a jury trial "reflect[s] a profound judgment about the way in which law should be enforced and justice administered," *Ring*, 536 U.S. at 609—a conception of jury verdicts as reflecting group deliberation, responsible factfinding, and the community's voice. The State offers a proceeding in which juries are told that their role is merely advisory; that they need only find undifferentiated "aggravation" without discussing or agreeing on which of Florida's 16 disparate aggravators exists; that they can recommend death even if a majority of jurors rejects each aggravator submitted for consideration; and that they can return a verdict and go home as soon as a bare majority votes for death. The combination of these procedures so cripples the jury's functioning as to eviscerate the essence of trial by jury. *Burch* v. *Louisiana*, 441 U.S. 130 (1979).

I. FLORIDA'S CAPITAL SENTENCING SCHEME IS UNCONSTITUTIONAL UNDER *RING*

A. Florida's Scheme Violates The Sixth Amendment

Florida's capital sentencing scheme violates the Sixth Amendment under *Ring* v. *Arizona*, 536 U.S. 584 (2002), because it assigns to the judge alone the power to render a defendant eligible for the death penalty by finding aggravating circumstances. As the State con-

cedes (at 17), a Florida capital defendant is not eligible for the death penalty unless one or more aggravators exist. But jury findings of aggravators are neither necessary nor sufficient to authorize a death sentence. *Coday* v. *State*, 946 So. 2d 988, 1005 (Fla. 2006). Florida law provides instead that those findings shall be made "by the court." Fla. Stat. § 775.082(1). The Florida Supreme Court has repeatedly confirmed that eligibility for the death penalty hinges solely upon the trial judge's "independent analysis of the aggravating and mitigating circumstances," "regardless of the jury's recommendation." *Delgado* v. *State*, 162 So. 3d 971, 981 (Fla. 2015) (internal quotation marks omitted); *see also* Fla. Stat. § 921.141(3). Contrary to the State's suggestion (at 6), that analysis is not limited to an independent "weighing" of aggravating and mitigating circumstances. Rather, "the trial court is required to make independent *findings* on aggravation, mitigation, *and* weight." *Russ* v. *State*, 73 So. 3d 178, 198 (Fla. 2011) (emphases added); *see* Pet. Br. 6-9, 18-22; Former Justices Br. 5-10.

As the State concedes (at 25 n.9), a Florida trial court can impose a death sentence even when the jury recommends a life sentence. *E.g.*, *Engle* v. *State*, 438 So. 2d 803, 812 (Fla. 1983). The court can impose a death sentence based on evidence or theories of aggravation presented only to the judge, after the jury has been dismissed. *E.g.*, *id.* at 813; *Williams* v. *State*, 967 So. 2d 735, 751 (Fla. 2007). And the court can impose a death sentence when it is entirely possible, given the number of aggravators presented and the number of jurors voting for death, that no majority of jurors found any single aggravator. *E.g.*, *Gonzalez* v. *State*, 136 So. 3d 1125, 1139 (Fla. 2014); *State* v. *Steele*, 921 So. 2d 538, 545 (Fla. 2005). These outcomes are possible—and oc-

cur with some frequency, *see* Former Justices Br. 15-19—precisely because the jury's verdict, and whatever findings it may imply about aggravating circumstances, are purely advisory.

The State emphasizes the trial judge's obligation to give "great weight" to the jury's recommendation and to override a recommendation of life imprisonment only for clear and convincing reasons. Resp. Br. 6, 25 (citing *Tedder* v. *State*, 322 So. 2d 908, 911 (Fla. 1975), and *Cheshire* v. *State*, 568 So. 2d 908, 910-911 (Fla. 1990)). But as the Florida Supreme Court has held, that obligation does not "chang[e] the clear statutory directive that the jury's role is advisory." *Combs* v. *State*, 525 So. 2d 853, 857 (Fla. 1988). That the trial judge must give weight to the jury's recommendation in making his or her own "independent findings," *Russ*, 73 So. 3d at 198, does not convert the advisory jury into a "de facto" sentencer, *Grossman* v. *State*, 525 So. 2d 833, 839-840 (Fla. 1988)—particularly because, as one Florida trial judge has noted, the jury's advisory verdict is often "essentially meaningless" to the judge, *Aguirre-Jarquin* v. *State*, 9 So. 3d 593, 612 (Fla. 2009) (Pariente, J., specially concurring) (quoting sentencing order of Eaton, J.).[1]

It is irrelevant that there may be capital defendants in Florida—as there surely were in Arizona before *Ring*—whose eligibility for the death penalty is established by a prior conviction or by jury findings entailed in the guilty verdict. *Cf.* Resp. Br. 19-20. That is not so for all Florida capital defendants, and it is not so for

---

[1] This Court's remark that Florida capital juries serve as "co-sentencer[s]" simply acknowledged that the advisory verdict is one input considered by the trial court in making its independent findings and determining the sentence. Resp. Br. 24 (quoting *Lambrix* v. *Singletary*, 520 U.S. 518, 528 (1997), and *Espinosa* v. *Florida*, 505 U.S. 1079, 1082 (1992) (per curiam)).

Hurst. Pet. Br. 5, 9. Nor is it relevant what "benefits" might inhere in a sentencing scheme that required jury findings of aggravators but then gave defendants a "second chance for life" by allowing the judge to override the jury's recommendation of death. *Cf.* Resp. Br. 26, 35-36. That is not the system Florida has chosen. As this Court has recognized, a "Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than [did] a trial judge in Arizona" under the law struck down in *Ring*. *Walton* v. *Arizona*, 497 U.S. 639, 648 (1990). Florida's sentencing scheme should be rejected for the same reason as Arizona's.[2]

B. Florida's Scheme Violates The Eighth Amendment

Florida's capital sentencing scheme also violates the Eighth Amendment because it assigns to the judge the power to impose the death penalty. The State criticizes (at 27-29) Hurst's argument on this point as procedurally improper, but the question presented by the Court asks whether Florida's system violates the Eighth Amendment in light of *Ring*, and the answer to that question is yes for the reasons Hurst has explained: History, current practice, and independent evaluation of the penological interests associated with capital punishment confirm that juries, not judges, should be re-

---

[2] The State correctly distinguishes the outcome in *Hildwin* v. *Florida*, 490 U.S. 638 (1989), as involving prior convictions that need not be found by a jury, but does not deny that *Hildwin*'s reasoning did not survive *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), and *Ring*. Resp. Br. 30 n.13; *see* Pet. Br. 19, 22-26. Moreover, this Court is "less constrained to follow precedent" set in cases, like *Hildwin*, decided "without full briefing or argument on [the] issue." *Johnson* v. *United States*, 135 S. Ct. 2551, 2562-2563 (2015); *see Hildwin*, 490 U.S. at 641 (Marshall, J., dissenting) (noting summary affirmance).

sponsible for selecting the death penalty. Pet. Br. 26-31; *see Ring*, 536 U.S. at 614 (Breyer, J., concurring).

The State does not dispute Hurst's recitation of the historical evidence that juries have held responsibility for imposing the death sentence throughout American history. Pet. Br. 27-28. And while the State seeks (at 31-32) to dismiss that historical evidence as irrelevant in light of comments in *Apprendi* v. *New Jersey* recognizing judges' sentencing discretion, *Apprendi* was not a capital case and did not address the unique considerations of the Eighth Amendment. *See* 530 U.S. 466, 481-482 (2000).[3] The State similarly does not dispute that, today, all but four States that maintain the death penalty vest the power to select a death sentence in the jury. Resp. Br. 33-34. That consensus "weigh[s] heavily in ascertaining contemporary standards of decency." *Woodson* v. *North Carolina*, 428 U.S. 280, 294-295 (1976) (joint opinion). The State suggests (at 33) that consensus should not matter because "some defendants receive a more lenient sentence from a judge than from a jury." But the same could have been said of the mandatory death-penalty statutes invalidated in *Woodson*, which long resulted in jury nullification verdicts in defendants' favor. *Woodson*, 428 U.S. at 293.

Finally, despite extolling the supposed virtues of judicial sentencing, the State does not deny that judicial sentencing fails in one critical respect: Only the jury can "express the conscience of the community." *Witherspoon* v. *Illinois*, 391 U.S. 510, 519 (1968). Juries

---

[3] *Apprendi* cited *Williams* v. *New York*, 337 U.S. 241 (1949), which was a capital case. But *Williams* considered only whether the Due Process Clause limited the "sources and types of evidence" a sentencing judge could consider; it did not address the Eighth Amendment. *Id.* at 245-252.

are "better situated" than judges "to make the moral judgment between life and death." *Glossip* v. *Gross*, 135 S. Ct. 2726, 2752 (2015) (Thomas, J., concurring). Entrusting the jury with the sentencing decision ensures that "the community indeed believes application of the death penalty is appropriate." *Ring*, 536 U.S. at 618 (Breyer, J., concurring); *see also Glossip*, 135 S. Ct. at 2748 (Scalia, J., concurring) ("It is because ... questions [related to capital punishment] are contextual and admit of no easy answers that we rely on juries to make judgments about the people and crimes before them."). By relegating the jury to an advisory role, Florida law severs the link between capital sentencing decisions and society's moral judgment.

II. THE *RING* VIOLATION REQUIRES VACATUR OF HURST'S SENTENCE

A. Hurst Did Not Waive His Jury-Trial Right

Faced with the unconstitutionality of Florida's death penalty scheme, the State now contends that no jury finding was necessary in Hurst's case because Hurst supposedly conceded that aggravating circumstances existed. The State acknowledges (at 41-42 n.20) that it made no such suggestion in opposition to certiorari even though the petition raised the *Ring* claim to which the alleged concessions relate. And the State gives no reason why the Court should overlook that failure. *See* S. Ct. R. 15.2. Assuming the Court does consider the point, the argument fails.

For Hurst's supposed concession to obviate the need for a jury finding, the concession would have to rise to the level of a waiver of Hurst's Sixth Amendment right to a jury trial. *Cf. Florida* v. *Nixon*, 543 U.S. 175, 187-188 (2004) (despite counsel's concession of guilt, defendant "retained the rights accorded a de-

fendant in a criminal trial," and the "State was [still] obliged to present during the guilt phase competent, admissible evidence establishing the essential elements of the crimes").[4] Such a waiver must be a "voluntary," "knowing, intelligent act[] done with sufficient awareness of the relevant circumstances and likely consequences." *Brady* v. *United States*, 397 U.S. 742, 748 (1970). When applying this standard, "[c]ourts indulge every reasonable presumption against waiver of fundamental constitutional rights [and] do not presume acquiescence in the loss of fundamental rights," including "the right to trial by jury in criminal cases." *College Sav. Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 682 (1999) (internal quotation marks and citations omitted). The decision to waive the jury-trial right must be made by the defendant himself; it "cannot be made for the defendant by a surrogate," such as his lawyer. *Nixon*, 543 U.S. at 187.[5]

---

[4] Because "there is [no] constitutionally significant difference between a fact that is an 'element' of the offense and one that is a 'sentencing factor,'" *Southern Union Co.* v. *United States*, 132 S. Ct. 2344, 2356 (2012), the same standard applies to waiver of the right to have a jury determine aggravators necessary for imposition of the death penalty. *See Bryant* v. *State*, 901 So. 2d 810, 822 (Fla. 2005). *Blakely* v. *Washington*, 542 U.S. 296, 303 (2004), did not suggest otherwise, for the admission before the Court there was a guilty plea.

[5] Florida courts will find a waiver of the jury-trial right only if the defendant personally declares his waiver in writing or after a colloquy with the court on the record, and the "better practice" is to require "both a personal on-the-record waiver and a written waiver." *Tucker* v. *State*, 559 So. 2d 218, 220 (Fla. 1990); *Johnson* v. *State*, 994 So. 2d 960, 964 (Fla. 2008) ("Without a proper colloquy, a defendant's [counsel's] stipulation does not function as a valid waiver."); *State* v. *Upton*, 658 So. 2d 86, 87 (Fla. 1995).

Here, Hurst never admitted the presence of aggravating circumstances, let alone personally waived his Sixth Amendment right to jury findings on aggravators. From his first appeal on, Hurst has maintained—even before *Ring* was decided—that he had a constitutional right to a jury determination whether aggravators existed. *See* Appellant's Initial Br., *Hurst* v. *State*, No. SC00-1042, 2001 WL 34114510, at 52-65 (Fla. Jan. 31, 2001); Record on Appeal Vol. III, *Hurst* v. *State*, No. SC12-1947, at 464-470 (Fla. Nov. 8, 2012) ("2012 ROA"); Appellant's Initial Br., *Hurst* v. *State*, No. SC12-1947, 2013 WL 6008508, at 64-69 (Fla. Mar. 15, 2013). The notion that Hurst simply meant to raise this claim and to seek a verdict form stating jury findings as a hypothetical exercise while simultaneously admitting the existence of aggravators and relinquishing the very constitutional right he sought to vindicate makes no sense.

Zero evidence supports the State's position. The State repeatedly cites Hurst's counsel's description of the case as a "robbery gone bad." *E.g.*, Resp. Br. 43 (quoting Appellant's Initial Br. 24 (SC12-1947)). But to establish the aggravating circumstance of commission during the course of a robbery, the State must show that the capital felony was committed while "the defendant" himself was engaged in robbery. Fla. Stat. § 921.141(5)(d). And here—as the State concedes—"[f]rom the beginning, Hurst denied that he ever made it to work that morning," much less committed a murder or robbery. Resp. Br. 4 (citing JA31); Record on Appeal Vol. III, *Hurst* v. *State*, No. SC00-1042, at 451-453 (Fla. Aug. 4, 2000) ("2000 ROA") (Hurst's initial sentencing memorandum); 2012 ROA Vol. III, at 548 (Hurst's re-sentencing memorandum); Appellant's Initial Br. 6-8 (SC12-1947).

The State grossly overreads several other statements in Hurst's briefs below. Hurst's initial sentencing memorandum—submitted in 2000 in a proceeding that became a legal nullity when the Florida Supreme Court vacated his initial death sentence because he had been denied the effective assistance of counsel, *see State* v. *Fleming*, 61 So. 3d 399, 406 (Fla. 2011); *Preston* v. *State*, 607 So. 2d. 404, 408 (Fla. 1992)—said that "[t]he State established two aggravating circumstances during the penalty phase trial." 2000 ROA Vol. III, at 451, *quoted in* Resp. Br. 42. The same memorandum declared that Hurst had "established" nine mitigating circumstances, 2000 ROA Vol. III, at 451, even though the jury had not found any (explicitly or implicitly) and the State had conceded only four. The locution chosen for those statements—by Hurst's constitutionally ineffective counsel—simply reported the parties' positions at sentencing. It did not purport to effectuate a knowing and voluntary waiver of Hurst's jury-trial right or to concede the existence of an aggravator. And Hurst's counsel's decision not to challenge on appeal the trial court's factual findings on those aggravators, *cf.* Resp. Br. 42-43, reflects a litigation judgment that Hurst's appellate focus was better aimed elsewhere in light of the Florida Supreme Court's deferential review of the trial court's aggravator findings. *See* JA34 (Florida Supreme Court asks only "whether the trial court applied the right rule of law for each aggravating circumstance and, if so, whether competent substantial evidence supports its finding" (internal quotation marks omitted)). Hurst was not required to contest those findings to preserve his constitutional challenge to the procedures under which the findings were made. *See Nixon*, 543 U.S. at 188.

No wonder, then, that the State did not raise Hurst's supposed concessions at any point during this appeal or in opposition to certiorari, and no wonder that the Florida Supreme Court resolved Hurst's *Ring* challenge on the merits without suggesting that Hurst had relinquished his Sixth Amendment rights. Nor did the Florida Supreme Court suggest that any *Ring* error could be overlooked as harmless, JA307-310—likely because the State never argued harmlessness, either. *See* Appellee's Answer Br., *Hurst* v. *State*, No. SC12-1947, 2013 WL 6008507, at 97-100 (Fla. May 22, 2013). The State now asserts harmless error, but cites only Hurst's debunked concessions and fact-specific decisions in other cases. Resp. Br. 40. The Court should reject the State's late gambit.[6]

B. The Advisory Verdict Did Not Imply The Necessary Findings

The State alternatively contends (at 44-48) that Hurst's sentencing complied with *Ring* because the jury's death recommendation "necessarily included a finding of an aggravating circumstance." As discussed, such a finding could not cure the *Ring* violation because the jury's implicit "finding" was neither necessary nor sufficient to authorize a death sentence. *Supra* pp. 2-5; Pet. Br. 33-34.

In any event, the jury's 7-5 recommendation cannot support an inference that a majority of jurors agreed that any aggravator or aggravators existed. Pet. Br. 31-32. Because multiple aggravators were presented, it is

---

[6] At most, the Court should address the constitutional issue as it "ordinarily" does and leave it to the Florida Supreme Court "to pass on the harmlessness of error in the first instance," *Ring*, 536 U.S. at 609 n.7—and to decide whether the State even preserved any assertion of harmlessness.

entirely possible that a super-majority of jurors rejected each one, as the State does not deny. And because the Florida Supreme Court has deemed it a "departure from the essential requirements of [Florida] law" to ask the jury to specify any aggravators it may have found, *Coday*, 946 So. 2d at 1005 (citing *Steele*, 921 So. 2d 538), such indeterminacy will plague every Florida case where the prosecution presents multiple aggravators and the jury recommends death—a situation in which the jury's advisory verdict is "essentially meaningless." *Aguirre-Jarquin*, 9 So. 3d at 612 (Pariente, J., specially concurring) (quoting sentencing order of Eaton, J.); *see* Former Justices Br. 8; Former Judges Br. 17.[7]

Citing *Schad* v. *Arizona*, 501 U.S. 624 (1991), the State responds (at 46) that *Ring* does not require the jury to "agree on a particular aggravator." On this view, taken to its logical conclusion, a death sentence can be imposed so long as seven jurors individually find one statutory aggravator each, even if each of those jurors finds a different aggravator—and even if each aggravator is rejected by 11 jurors. *Schad* does not support the State's position.

Schad held that the Due Process Clause did not require the jury to agree on whether the mens rea element of first-degree murder was satisfied by premeditation or by felony murder. 501 U.S. at 630-631, 645 (plurality); *id.* at 650 (Scalia, J., concurring in part and concurring in judgment). The Court acknowledged

---

[7] The State cites *Hildwin* (at 45-46) to defend Florida law's refusal to ask juries to specify any findings, but as discussed, that reasoning does not survive *Ring*. The State also cites *Espinosa* v. *Florida*, 505 U.S. 1079 (1992), but that pre-*Ring* summary decision addressed only whether a jury instruction's defective definition of an aggravating factor so corrupts the judge's subsequent decision that it violates the Eighth Amendment. *Id.* at 1080-1082.

"limits on a State's capacity to define different courses of conduct, or states of mind, as merely alternative means of committing a single offense," *id.* at 632 (plurality), but found it unnecessary to define those limits because the two theories of mental state at issue could reasonably be viewed as morally equivalent and had historically been treated as alternative means to satisfy the same element, *id.* at 643-644.

Even assuming *Schad*'s due process analysis could give substance to the Sixth Amendment's jury-trial guarantee, it would not support the State's position because Florida's statutory aggravators are too disparate. To satisfy due process, elements of crimes must be defined so as not to "risk[] serious unfairness" or to "lack[] support in history or tradition." *Richardson* v. *United States*, 526 U.S. 813, 820 (1999) (citing *Schad*, 501 U.S. at 632-633 (plurality), and *id.* at 651 (Scalia, J., concurring)); *see also Schad*, 501 U.S. at 642. Florida law recognizes 16 statutory aggravators, Fla. Stat. § 921.141(5)—twice as many as when this Court decided *Proffitt* v. *Florida*, 428 U.S. 242, 251 (1976). Those aggravators range from the crime's "especially heinous, atrocious, or cruel" nature, to the defendant's motive for "pecuniary gain," to the defendant's membership in a criminal gang, to the age of the victim. Fla. Stat. § 921.141(5). The Florida Supreme Court has interpreted these aggravators to be distinct factors that reflect disparate levels of blameworthiness. *E.g.*, *Bevel* v. *State*, 983 So. 2d 505, 524 (Fla. 2008). This wide-ranging menu of incommensurable aggravators bears no resemblance to the long-lived historical treatment of felony murder and premeditated murder at issue in *Schad*.

The State's reliance on *Schad* also ignores a key requirement of any valid capital punishment system. To prevent arbitrariness in the infliction of the death

penalty, aggravators must be "determinate" and must "genuinely narrow the class of persons eligible for the death penalty." *Arave* v. *Creech*, 507 U.S. 463, 474 (1993) (internal quotation marks omitted). They must "provide specific and detailed guidance" and "make rationally reviewable the process for imposing a sentence of death." *Id.* at 470-471 (internal quotation marks omitted); *see also Maynard* v. *Cartwright*, 486 U.S. 356, 361-363 (1988). A sentencing scheme like the one the State posits, in which jurors can find the undifferentiated element of "aggravation" on any number of disparate theories, would fail those requirements. Florida law does not—and could not constitutionally—condition eligibility for the death penalty on the mere presence of "enhanced culpability," as the State suggests (at 47), but rather requires a finding of one or more enumerated and clearly differentiated aggravators. Fla. Stat. § 921.141(3), (5). The jury's general advisory verdict in Hurst's case does not entail such a finding.

III. The State's Defense Of Florida's Capital Sentencing Scheme Raises Other Constitutional Problems

If Florida juries actually made the finding required by *Ring* as the State contends, they would do so in a way that contravenes basic Sixth and Eighth Amendment guarantees in several other respects, most fundamentally under this Court's decision in *Burch* v. *Louisiana*, 441 U.S. 130 (1979). Pet. Br. 34-54. These failures are not unpreserved alternative arguments for reversal. *Cf.* Resp. Br. 48. They are unavoidable defects of the State's defense of Hurst's sentence. The Court cannot reject Hurst's *Ring* challenge on the grounds the State advances without confronting the bankruptcy of the State's concept of the right to a jury trial.

A. The Jury Had No Sense Of Responsibility For Hurst's Sentence

As is typical in Florida cases, Hurst's jury was told that it was not responsible for determining whether Hurst would be eligible for the death penalty. The jury was not asked to render specific findings on aggravators, and was repeatedly told that its role was merely "advisory" and that "[t]he final decision as to which punishment shall be imposed was the responsibility of the judge." JA207-208; *see also* JA342; JA498; JA985; Former Justices Br. 6 n.2 (standard instructions "repeatedly remind the jury that the responsibility for the death sentence 'rests elsewhere'").

If, therefore, the State were right that the jury made implicit findings that authorized imposition of the death sentence, the jury instructions would have misleadingly "minimize[d] the jury's sense of responsibility for determining the appropriateness of death," in violation of the Eighth Amendment. *Caldwell* v. *Mississippi*, 472 U.S. 320, 341 (1985); *see* Pet. Br. 35. Telling the jury that its recommendation would be given weight by the judge does not convey the level of responsibility the State now attributes to the jury's verdict.

The State notes (at 49) that the Florida Supreme Court has upheld Florida's standard jury instructions against *Caldwell* claims. But the court has done so only because it acknowledges what the State's brief denies: that the sentencing verdict is purely advisory, so that instructions to that effect are not misleading. *See Combs*, 525 So. 2d at 856-858; Pet. Br. 36. The State cannot have it both ways. Either the instruction satisfies *Caldwell* because it accurately describes a sentencing scheme that violates *Ring*, *see Combs*, 525 So. 2d at 858, or the instruction violates *Caldwell* because it fails

to give the jury a proper understanding of its role within the scheme the State submits to satisfy *Ring*.

B. The Jury Deliberated Under A Simple Majority Rule

If the State were right that the jury made implicit findings that authorized the imposition of Hurst's death sentence, those findings would have violated the Sixth and Eighth Amendments because Florida law permitted the jury to make them by no more than a majority vote, and there is no basis to infer that any more than seven jurors found an aggravator. Pet. Br. 36-52.

The State does not deny that no other State permits an element of any serious crime to be established by a simple-majority verdict. Pet. Br. 41-44. Nor does it cite a single decision by any court approving of such a voting rule. Pet Br. 38-41. The State rests largely on *Apodaca* v. *Oregon*, 406 U.S. 404 (1972). But *Apodaca* involved a super-majority (10-2) rule applicable only in non-capital cases. *Id.* at 406 (plurality); *see also Johnson* v. *Louisiana*, 406 U.S. 356, 369-380 (1972) (Powell, J., concurring in the judgment in *Apodaca*). It lends no support to the application of a simple-majority (7-5) rule in capital cases. Pet. Br. 39.[8]

---

[8] *Johnson*, also a non-capital case, held only that a 9-3 verdict does not violate the separate due process requirement that the elements of a crime be established beyond a reasonable doubt. 406 U.S. at 359; *cf.* Resp. Br. 51-52, 54.

Because *Apodaca* did not consider a simple-majority rule, the Court need not revisit that decision. But should the Court see a need to do so, overruling *Apodaca*'s approval of any departure from unanimity would not implicate any cognizable reliance interests of the States. Pet. Br. 45-47; *cf.* Resp. Br. 56. Only Oregon, Louisiana, and Florida have adopted nonunanimous rules, and each did so before *Apodaca*.

The State also does not dispute that centuries of Anglo-American practice have shunned simple-majority jury rules in favor of unanimity or near-unanimity. Pet. Br. 40-43. Historical considerations are critical in interpreting Sixth Amendment guarantees, *e.g.*, *Apprendi*, 530 U.S. at 478-484; *Crawford* v. *Washington*, 541 U.S. 36, 42-56 (2004)—particularly where a feature of the common-law jury trial, such as unanimity, was considered "indispensable," 2 Story, *Commentaries on the Constitution of the United States* § 777, at 248 (1833). The State seeks (at 52) to dismiss this history on the theory that the *Apodaca* plurality upheld a non-unanimous voting rule (but not a simple-majority rule) based on supposed ambiguity in the evidence of the Sixth Amendment's original intent. But five Justices in *Apodaca* rejected the plurality's view on that point.[9]

The State's suggestion (at 53-55) that simple-majority deliberations are not necessarily worse than those produced by more demanding voting rules is equally meritless. "'[T]he very object of the jury system is to secure unanimity by a comparison of views, and by arguments among the jurors themselves.'" *Jones* v. *United States*, 527 U.S. 373, 382 (1999); *see also McKoy* v. *North Carolina*, 494 U.S. 433, 452 (1990) (Kennedy, J., concurring) ("[U]nanimity ... is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room[.]"). The "consistent"

---

[9] *Johnson*, 406 U.S. at 371 n.6 (Powell, J., concurring in the judgment in *Apodaca*) (ambiguity in the Sixth Amendment's history "not sufficient ... to override the unambiguous history of the common-law right"); *id.* at 382 & nn.1-2 (Douglas, J., joined by Brennan, J., and Marshall, J., dissenting) (similar); *Apodaca*, 406 U.S. at 414-415 (Stewart, J., joined by Brennan, J., and Marshall, J., dissenting) (similar).

findings of the empirical research show that juries not subject to a unanimity requirement "tend to take less time to reach a verdict, take fewer polls, and ... cease deliberating when [the minimum necessary vote] is reached." Devine et al., *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 Psychol. Pub. Pol'y & L. 622, 669 (2001) (citations omitted); *see also* Pet. Br. 44-45; ABA Br. 14-16. Hurst's case illustrates the point. The jurors deliberated for less than two hours before recommending death by a 7-5 margin. JA24-25.[10]

A simple-majority rule also violates the Eighth Amendment by "'risk[ing] erroneous imposition of the death sentence.'" *Mills* v. *Maryland*, 486 U.S. 367, 375 (1988); *see* Pet Br. 47-52. Contrary to the State's assertions (at 57-58), Florida's simple-majority rule—like other procedural rules invalidated under the Eighth Amendment—"favor[s] death" in the most straightforward of ways: It makes a defendant death-eligible when only a majority of jurors agrees on death, while a stricter voting rule would preclude a death sentence in those circumstances without further deliberation and broader agreement.

The State's response (at 57) again seeks to have it both ways. Regardless whether the Eighth Amendment itself requires a jury determination of aggravating circumstances—as the Sixth Amendment certainly does—once a State entrusts the jury with finding ag-

---

[10] In *Johnson*, 406 U.S. at 311, the Court rejected the "unsupported assumption[]" that, under a 9-3 rule, jurors in the majority would ignore the views of the minority, where the petitioner had offered "no evidence" to support that claim. Empirical research conducted during the four decades since *Johnson* has provided such evidence. Pet. Br. 44-45. The State cites nothing to the contrary.

gravating circumstances as the State claims to do here, the Eighth Amendment prohibits it from imposing a voting rule that undermines the reliability of the resulting death sentence. *McKoy*, 494 U.S. at 438 (invalidating unanimity requirement as to mitigating circumstances); *Mills*, 486 U.S. at 384 (similar). If the jury were making any findings at all, Florida's simple-majority rule would do just that.[11]

C. Florida's Sentencing Scheme Subverted The Jury's Deliberative Function

Finally, if the State were correct that Hurst's jury made the findings required by *Ring*, those findings would lack the "essential feature" of a meaningful jury trial: "'interposition between the accused and his accuser of the commonsense judgment of a group of laymen'" and the assurance of "'community participation and shared responsibility'" in and for the verdict. *Burch*, 441 U.S. at 135. Whatever the validity of Florida's procedures in isolation, their combined effect "at the intersection" of constitutional commands this Court has recognized as essential is to create a unique capital sentencing scheme that does "not permit the jury to function in the manner required by [this Court's] prior cases." *Id.* at 137; Pet. Br. 52-54.

In its sole response—a footnote (at 58 n.33) that does not even acknowledge *Burch* by name—the State shrugs off this point as an assertion of "cumulative er-

---

[11] *Spaziano* v. *Florida*, 468 U.S. 447 (1984), was decided before *Ring* on the premise that the judge's "own findings" made the defendant death-eligible. *Id.* at 466. Indeed, in *Spaziano*, the judge imposed the death penalty against the jury's recommendation. *Id.* at 451-452. *Spaziano* does not address the reliability required of jury procedures when—as the State now claims—it is the jury's findings that make a defendant death-eligible.

ror." That contention reveals a fundamental misconception. *Burch* is not a "cumulative error" ruling concerned with the tallying on appeal of prejudice from almost-harmful errors. Rather, *Burch* recognizes a substantive constraint on how States can arrange their criminal proceedings. It requires that, whatever jury procedures a State chooses to adopt, those procedures cannot interact in a way that precludes responsible factfinding. 441 U.S. at 133-138. The State's highly questionable assertion (at 58 n.33) that the "combination of Florida's sentencing approach in most cases benefits the defendant"—even if true—would provide no basis for overlooking the constitutional error that arises when a State's jury practices undermine the integrity of the jury function.

The State's casual dismissal of *Burch*, like its other contentions—that a jury finding of "aggravation" suffices even without juror agreement on any particular theory, that a jury can be misled about the legal effect of its verdict, and that juries need not deliberate beyond a simple majority vote (even if a majority of jurors has actually rejected each relevant aggravator)—reflects an astonishingly crabbed view of the jury's constitutional role in administering the death penalty. Even if the Court were to accept the State's revision of Florida law to resolve the *Ring* violation, *but see supra* pp. 2-5, it should not accept the State's expedient revision of the Sixth and Eighth Amendment protections that govern capital sentencing.

CONCLUSION

The Florida Supreme Court's judgment should be reversed and Hurst's sentence should be vacated.

Respectfully submitted.

NANCY A. DANIELS
PUBLIC DEFENDER
DAVID A. DAVIS
ASSISTANT PUBLIC DEFENDER
Leon County Courthouse
301 South Monroe Street
Suite 401
Tallahassee, FL 32301

MARK E. OLIVE
LAW OFFICES OF MARK E. OLIVE, P.A.
320 West Jefferson Street
Tallahassee, FL 32301

SETH P. WAXMAN
Counsel of Record
CATHERINE M.A. CARROLL
DAVID M. LEHN
FRANCESCO VALENTINI
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
seth.waxman@wilmerhale.com

ERIC F. FLETCHER
ALLISON TRZOP
WILMER CUTLER PICKERING HALE AND DORR LLP
60 State Street
Boston, MA 02109

AUGUST 2015

Supreme Court U.S.
FILED
AUG 5 - 2015
OFFICE OF THE CLERK

No. 14-7505

In the Supreme Court of the United States

TIMOTHY LEE HURST,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Writ of Certiorari to the Supreme Court of Florida

BRIEF OF *AMICI CURIAE* ALABAMA AND MONTANA IN SUPPORT OF RESPONDENT

Tim Fox
Montana Attorney General

OFFICE OF THE MONTANA ATTORNEY GENERAL
215 N SANDERS, THIRD FL.
HELENA, MT 59620
(406) 444-2026

Luther Strange
Alabama Attorney General

Andrew L. Brasher
Solicitor General
Counsel of Record

Megan A. Kirkpatrick
Deputy Solicitor General

OFFICE OF THE ALABAMA ATTORNEY GENERAL
501 WASHINGTON AVE.
MONTGOMERY, AL 36130
(334) 242-7300
abrasher@ago.state.al.us

August 5, 2015

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. Florida's sentencing system is constitutional under this Court's established precedent 3

A. Judicial involvement in sentencing was a response to *Furman* 3

B. Florida's sentencing structure is a constitutional response to *Furman* 5

C. *Harris* and *Spaziano* should not be reconsidered 8

II. History supports the constitutionality of Florida's capital sentencing regime 9

A. Historically, the judge has had the predominant role in sentencing 10

B. Historically, jury unanimity is important to the adjudication of guilt, not the imposition of a sentence. 12

III. Important policy considerations support the role of judges in capital sentencing 14

A. Judicial sentencing is less arbitrary and more consistent than jury sentencing 14

B. Judicial sentencing improves the general deterrent effect of capital punishment 16

CONCLUSION 20

TABLE OF AUTHORITIES

Cases

Alleyne v. United States,
133 S. Ct. 2151 (2013) 8, 9

Apodaca v. Oregon,
406 U.S. 404 (1972) 12, 13

Bivins v. State,
642 N.E.2d 928 (Ind. 1994) 8

Blystone v. Pennsylvania,
494 U.S. 299 (1990) 1, 5

Brice v. State,
815 A.2d 314 (Del. 2003) 8

Commonwealth v. Roney,
581 Pa. 587 (2005) 8

Ex parte Carroll,
852 So. 2d 833 (Ala. 2002).....4

Furman v. Georgia,
408 U.S. 238 (1972) 1, 3, 6

Graham v. Florida,
560 U.S. 48 (2010) 6

Gregg v. Georgia,
428 U.S. 153 (1976) 4

Harris v. Alabama,
513 U.S. 504 (1995) 6, 7, 8

Higgs v. United States,
711 F. Supp. 2d 479 (D. Md. 2010) 7

Kansas v. Marsh,
548 U.S. 163 (2006) 3

Lee v. Comm'r, Ala. Dep't of Corr.,
726 F.3d 1172 (11th Cir. 2013) 7

Lockhart v. State,
2013 WL 4710485 (Ala. Crim. App. 2013),
cert. denied, 135 S. Ct. 1844 (2015) 5

McCleskey v. Kemp,
481 U.S. 279 (1987) 5

Nebraska v. Gales,
265 Neb. 598 (2003).....8

Oken v. State,
378 Md. 179 (2003) 8

Proffit v. Florida,
428 U.S. 242 (1976) 8

Ring v. Arizona,
536 U.S. 584 (2002) 7, 9

Ritchie v. State,
809 N.E.2d 258 (Ind. 2004) 8

Scott v. State,
2012 WL 4757901 (Ala. Crim. App. 2012),
cert. denied, 135 S. Ct. 1844 (2015) 5

Spaziano v. Florida,
468 U.S. 447 (1984) 6, 8, 9

State v. Fry,
138 N.M. 700 (2005) 8

Trop v. Dulles,
356 U.S. 86 (1958) 9

United States v. Purkey,
428 F.3d 738 (8th Cir. 2005) 7

United States v. Sampson,
486 F.3d 13 (1st Cir. 2007) 7

Walton v. Arizona,
497 U.S. 639 (1990) 7

Witherspoon v. State of Ill.,
391 U.S. 510 (1968) 13

Woodward v. State,
123 So. 3d 989 (Ala. Crim. App. 2011), *cert. denied*, 134 S. Ct. 405 (2013) 5

Statutes

Ala. Code § 13A-5-40 4

Ala. Code § 13A-5-47 ..... 4, 7

Ala. Code § 13A-5-49 4

Ala. Code § 13A-5-51 4

Del. Code tit. 11, § 4209 7

Fla. Stat. § 921.141 ..... 4, 7

Mont. Code Ann. § 46-18-301 ..... 4, 7

Mont. Code Ann. § 46-18-305 ..... 4, 7

Okla. Stat. § 701.10 4

Utah Code Ann. § 76-3-207 4

Va. Code. Ann. § 19.2-264.4 4

Other Authorities

141 Cong. Rec. S7662 (June 5, 1995) 18

Alan M. Dershowitz, *Criminal Sentencing in the United States: An Historical and Conceptual Overview*, 423 Annals Am. Acad. Pol. & Soc. Sci. 117 (1976) 12

Albert Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. Chi. L. Rev. 867 (1994) 12

American Bar Association, *Handbook of International Standards on Sentencing Procedure* (2010) 15

Art Barnum and Ted Gregory, *Woman slain in Oak Brook parking lot*, Chi. Trib., Apr. 14, 2011.....18

Cass R. Sunstein & Adrian Vermuele, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 Stan. L. Rev. 703 (2005).....17

Chad Flanders, *The Case Against the Case Against the Death Penalty*, 16 New Crim. L. Rev. 595 (2013) 16

Charles N. W. Keckler, *Life v. Death: Who Should Capital Punishment Marginally Deter?*, 2 J.L. Econ. & Pol'y 51 (2006).....18

Charles W. Webster, *Jury Sentencing—Grab-Bag Justice*, 14 Sw. L.J. 221 (1960) 15

Douglas G. Smith, *The Historical and Constitutional Contexts of Jury Reform*, 25 Hofstra Law Rev. 377 (1996) 11

Erik Lillquist, *The Puzzling Return of Jury Sentencing: Misgivings about* Apprendi, 82 N.C.L. Rev. 621 (2004) 10

H. Naci Mocan & R. Kaj Gittings, *Getting Off Death Row: Commuted Sentences and the Deterrent Effect of Capital Punishment*, 46 J.L. & Econ. 453 (2003) 17

Hashem Dezhbakhsh et al., *Does Capital Punishment Have a Deterrent Effect? New Evidence from Postmoratorium Panel Data*, 5 Am. L. & Econ. Rev. 344 (2003); 17

Joanna M. Shepherd, *Deterrence Versus Brutalization: Capital Punishment's Differing Impacts Among States*, 104 Mich. L. Rev. 203 (2005) 17

Joanna M. Shepherd, *Murders of Passion, Execution Delays, and the Deterrence of Capital Punishment*, 33 J. Legal Stud. 283 (2004) 17

John Proffatt, *A Treatise on Trial By Jury* (1876) 13

Joseph Story, *Commentaries on the Constitution of the United States* (5th ed. 1891).....13

Nancy Gertner, *A Short History of American Sentencing: Too Little Law, Too Much Law, or Just Right*, 100 J. Crim. L. & Criminology 691 (2010) 11, 12

Nathan A. Forrester, *Judge Versus Jury: The Continuing Validity of Alabama's Capital Sentencing Regime After* Ring v. Arizona, 54 Ala. L. Rev. 1157 (2003) 3

Paul R. Zimmerman, *Estimates of the Deterrent Effect of Alternative Execution Methods in the United States: 1979-2000*, 65 Am. J. Econ. & Soc. 909 (2006) 17

Paul R. Zimmerman, *State Executions, Deterrence, and the Incidence of Murder*, 7 J. Applied Econ. 163 (2004).....17

President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* (1967).....14

Radha Iyengar, *Who's the Fairest in the Land? Analysis of Judge and Jury Death Penalty Decisions*, 54 J.L. & Econ. 693 (2011).....15, 19

Randall R. Jackson, *Missouri's Jury Sentencing Law: A Relic the Legislature Should Lay to Rest*, 55 J. Mo. B. 14 (1999).....15

Richard A. Posner, *The Economics of Capital Punishment*, 3 The Economists' Voice, Issue 3 (2006) 17

Robert E. Knowlton, *Problems of Jury Discretion in Capital Cases*, 101 U. Penn. L. Rev. 1099 (1953) 6

S. Rep. 107-315 (2002).....18

INTEREST OF *AMICI CURIAE*

Alabama and Montana prosecute crimes and sentence criminals. Like the Florida capital sentencing system at issue in this case, their systems were designed in response to *Furman v. Georgia*, 408 U.S. 238 (1972). The specific fact-pattern presented here could not have arisen in Alabama or Montana. But we have an interest in seeing the Court reject the petitioner's broadside attack on capital sentencing structures that were designed to make the imposition of capital punishment more consistent and less subjective.

At their heart, the petitioner's arguments are that Florida's system must be unconstitutional because it is unusual. This Court has soundly rejected that argument in the past. *E.g.*, *Blystone v. Pennsylvania*, 494 U.S. 299, 308 (1990) ("The fact that other States have enacted different forms of death penalty statutes which also satisfy constitutional requirements casts no doubt on Pennsylvania's choice."). And it should reject it again here.

SUMMARY OF ARGUMENT

I. The States have relied on this Court's precedent in designing capital sentencing systems. These systems reflect the democratic will of the people and fully comply with the post-*Furman* capital sentencing precedent established by this Court. While *Apprendi* and *Ring* have clarified which findings constitute factual elements of a crime and therefore must be found by a jury, these cases do not require States to abandon their judicial sentencing

regimes. Each State, as before, is free to develop its own capital sentencing regime; and each State has discretion to create its own method of weighing aggravating and mitigating factors, as long as the sentencer – whether court or jury – is properly channeled in its discretion to avoid arbitrary results. Florida's system is constitutional under this Court's precedents.

II. The petitioner and his supporting *amici* obscure the historical analysis of the traditional role of the jury. The jury has always held the role of fact-finder and the responsibility of issuing a verdict. However, nothing compels the jury to play the role of sentencer; in fact, historical analysis points the other way. Judges have always exercised discretion when it comes to sentencing authority. Moreover, historical support for jury unanimity is strongest in the determination of guilt. History does not support a constitutional requirement that a jury vote unanimously to impose a sentence.

III. The roles of judge and jury in sentencing involve policy decisions that have been left to the State legislatures. And contrary to the arguments of Hurst's *amici*, States can reasonably conclude that judicial sentencing is superior to jury sentencing in the capital context. Arguments against the efficacy of jury sentencing apply equally in the capital context, and a State legislature's decision to grant such power to the judge is a legitimate policy decision. Moreover, the death penalty serves a justifiable deterrence function, and judicial sentencing serves this deterrence function to a greater extent than does jury sentencing.

ARGUMENT

I. Florida's sentencing system is constitutional under this Court's established precedent.

The Florida system finds its roots in *Furman*. There, the Court invalidated the death penalty because it was arbitrary. Specifically, the Court held unconstitutional the practice of allowing "juries [to] make the decision whether to impose a death sentence wholly unguided by standards governing that decision." *Furman*, 408 U.S. at 295 (Brennan, J., concurring). After *Furman*, States had to design systems that more consistently applied the death penalty. Many States, in response to *Furman*, removed certain decisions from the jury and gave them to a judge instead.

A. Judicial involvement in sentencing was a response to *Furman*.

In *Furman*, this Court identified serious problems of consistency and arbitrariness in the death penalty as it then existed. But it gave the States "a range of discretion" in formulating a solution. *See Kansas v. Marsh*, 548 U.S. 163, 174 (2006). The States responded with new procedures that eliminated or curtailed the jury discretion that had been capital punishment's defining characteristic up to that point. *See* Nathan A. Forrester, *Judge Versus Jury: The Continuing Validity of Alabama's Capital Sentencing Regime After* Ring v. Arizona, 54 Ala. L. Rev. 1157, 1164-1178 (2003) (summarizing Alabama's response).

Most States responded to *Furman* by severing the question of a defendant's guilt from the question of his penalty. Again, this innovation was at the Court's behest. The Court explained in *Gregg* that "the concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious

manner are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information." *Gregg v. Georgia*, 428 U.S. 153, 195 (1976).

Montana went further and chose to leave the sentencing decision to the judge alone. *See* Mont. Code Ann. §§ 46-18-301, 46-18-305 (current through 2015). And other States gave the defendant the right to choose to be tried or sentenced before a judge. *See, e.g.*, Okla. Stat. § 701.10; Utah Code Ann. § 76-3-207; Va. Code. Ann. § 19.2-264.4. The idea, of course, was that sentences imposed by judges would be more thoughtful and uniform than sentences imposed by juries.

Finally, States like Florida and Alabama responded to *Furman* by creating hybrid systems under which the jury recommends an advisory sentence, but the judge makes the final sentencing decision. *See* Ala. Code § 13A-5-47; Fla. Stat. § 921.141. Under Alabama law, for example, an intentional murder is capital when the jury finds one of several aggravating factors in either the guilt or penalty phase. *See* Ala. Code § 13A-5-40. The jury recommends a sentence, but the judge determines how to sentence the defendant by weighing the statutory aggravating factors and any mitigating factors. *See* Ala. Code § 13A-5-47, 49, & 51. The judge must enter a written sentencing order that identifies the aggravating and mitigating factors and explains the weight given each. *See id.* § 13A-5-47(d). The appellate courts then review the trial judge's decision, performing their own weighing of the aggravating and mitigating circumstances. *See generally Ex parte Carroll*, 852 So. 2d 833, 836 (Ala. 2002).

These systems are all legitimate responses to the problems identified in *Furman*. A state capital sentencing system (1) must "establish rational criteria that narrow the decisionmaker's judgment as to whether the circumstances of a particular defendant's case meet the threshold" and (2) "cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the penalty." *McCleskey v. Kemp*, 481 U.S. 279, 305-06 (1987). But, within these "constitutional limits," "the States enjoy their traditional latitude to prescribe the method by which those who commit murder shall be punished." *Blystone*, 494 U.S. at 308.

B. Florida's sentencing structure is a constitutional response to *Furman*.

The petitioner and supporting *amici* erroneously argue that Florida's system is inconsistent with the Eighth and Sixth Amendments because it confers sentencing discretion on the judge. Florida's brief rightly questions whether the petitioner even preserved broader questions about the constitutionality of judicial sentencing. *See* Brief of Respondent at 27-29. And the Court has recently denied certiorari in cases that squarely presented these arguments.[1]

Regardless, the petitioner's argument also finds no purchase in this Court's precedent. Instead, the Court has expressly upheld the constitutionality of systems like Florida's and Alabama's, even though they confer sentencing discretion on a judge. *See*

---

[1] *See, e.g.*; *Woodward v. State*, 123 So. 3d 989 (Ala. Crim. App. 2011), *cert. denied*, 134 S. Ct. 405 (2013); *Lockhart v. State*, 2013 WL 4710485 (Ala. Crim. App. 2013), *cert. denied*, 135 S. Ct. 1844 (2015); *Scott v. State*, 2012 WL 4757901 (Ala. Crim. App. 2012), *cert. denied*, 135 S. Ct. 1844 (2015).

Spaziano v. Florida, 468 U.S. 447 (1984); *Harris v. Alabama*, 513 U.S. 504 (1995). Neither the Eighth Amendment nor the Sixth Amendment call into question the constitutionality of judicial sentencing.

This Court's Eighth Amendment jurisprudence invalidates only the imposition of certain sentences based on "the nature of the offense" or "the characteristics of the offender." *Graham v. Florida*, 560 U.S. 48, 60 (2010). The Eighth Amendment "is not concerned with the process by which a State determines that a particular punishment is to be imposed in a particular case" but rather "forbids the imposition of punishments that are so cruel and inhumane as to violate society's standards of civilized conduct." *Furman*, 408 U.S. at 397 (1972) (Burger, J., dissenting). There is no third category that focuses on societal consensus *about procedure*. As a result, the Eighth Amendment provides a uniquely poor vehicle for determining whether there is a constitutional right to jury sentencing in capital cases.

But even if the societal consensus were relevant to this question, there has been no "evolution" in any particular direction. In 1953, three states placed final sentencing authority with a judge in capital cases. "In Utah, New York and Delaware a judge [could] not impose a penalty other than death unless the jury recommends life imprisonment, although he [could] impose the death sentence in spite of such a recommendation if he so desire[d]." Robert E. Knowlton, *Problems of Jury Discretion in Capital Cases*, 101 U. Penn. L. Rev. 1099, 1133 (1953). In 1984, the number remained at three, with Florida, Alabama, and Indiana granting judges the final sentencing decision after juries provided advisory recommendations. *Spaziano*, 468 U.S. at 464 n.9. By 1995, the year *Harris* was decided, the list of judicial sentencing states had grown to four with the return

of Delaware. *Harris*, 513 U.S. at 516. At present, Montana gives sole sentencing authority to a judge, to weigh aggravating factors found by the trier of fact. *See* Mont. Code Ann. §§ 46-18-301, 46-18-305 (current through 2015). Three states – Delaware, Florida, and Alabama – allow a judge to impose a sentence regardless of a jury's recommendation. *See* Ala. Code § 13A-5-47; Fla. Stat. § 921.141; Del. Code tit. 11, § 4209(d).

The Sixth Amendment and *Ring/Apprendi* also do not call into question the constitutionality of judicial sentencing. As Justice Scalia explained in *Ring v. Arizona*, "States that leave the ultimate life-or-death decision to the judge may continue to do so—by requiring a prior jury finding of aggravating factor in the sentencing phase or, more simply, by placing the aggravating-factor determination (where it logically belongs anyway) in the guilt phase." 536 U.S. 584, 612-13 (2002) (Scalia, J., concurring). Although *Ring* overruled *Walton v. Arizona*, 497 U.S. 639 (1990), in part, it left untouched *Walton*'s holding that judicial sentencing is consistent with the Sixth Amendment. The lower courts have unanimously held that a judge may determine a capital defendant's sentence consistent with *Ring*.[2]

---

[2] *See, e.g., Lee v. Commissioner, Alabama Dep't of Corr.*, 726 F.3d 1172, 1198 (11th Cir. 2013) ("*Ring* does not foreclose the ability of the trial judge to find the aggravating circumstances outweigh the mitigating circumstances."); *United States v. Sampson*, 486 F.3d 13, 32 (1st Cir. 2007) ("As other courts have recognized, the requisite weighing constitutes a process, not a fact to be found."); *United States v. Purkey*, 428 F.3d 738, 750 (8th Cir. 2005) (characterizing the weighing process as "the lens through which the jury must focus the facts that it has found" to reach its individualized determination); *Higgs v. United States*, 711 F. Supp. 2d 479, 540 (D. Md. 2010) ("Whether the aggravating factors presented by the prosecution outweigh the mitigating factors presented by the defense is a normative

C. *Harris* and *Spaziano* should not be reconsidered.

Ultimately, the petitioner and his supporting *amici* recognize that their broader arguments are barred by this Court's long-settled precedent. *See* Brief for Petitioner 26–31 (attacking the validity of *Spaziano*, *Harris*, and *Proffit v. Florida*, 428 U.S. 242 (1976)). But they have not provided any reason to overrule these cases. There have been no intervening doctrinal developments that undermine these precedents. *See Alleyne v. United States*, 133 S. Ct. 2151, 2166 (2013) (Sotomayor, J., concurring). And the number of States that rely on these precedents has remained constant, demonstrating no

---

question rather than a factual one."); *State v. Fry*, 138 N.M. 700, 126 P.3d 516, 534 (2005) ("[T]he weighing of aggravating and mitigating circumstances is thus not a 'fact that increases the penalty for a crime beyond the prescribed statutory maximum.'"); *Commonwealth v. Roney*, 581 Pa. 587, 866 A.2d 351, 360 (2005) ("[B]ecause the weighing of the evidence is a function distinct from fact-finding, *Apprendi* does not apply here."); *Ritchie v. State*, 809 N.E.2d 258, 266 (Ind. 2004) ("In *Bivins v. State*, 642 N.E.2d 928, 946 (Ind. 1994), we concluded, as a matter of state law, that '[t]he determination of the weight to be accorded the aggravating and mitigating circumstances is not a 'fact' which must be proved beyond a reasonable doubt but is a balancing process.' *Apprendi* and its progeny do not change this conclusion."); *Brice v. State*, 815 A.2d 314, 322 (Del. 2003) (*Ring* does not apply to the weighing phase because weighing "does not increase the punishment."); *Nebraska v. Gales*, 265 Neb. 598, 658 N.W.2d 604, 627–29 (2003) ("[W]e do not read either *Apprendi* or *Ring* to require that the determination of mitigating circumstances, the balancing function, or proportionality review be undertaken by a jury"); *Oken v. State*, 378 Md. 179, 835 A.2d 1105, 1158 (2003) ("The weighing process never was intended to be a component of a 'fact finding' process.").

change in the "evolving standards of decency." *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

Moreover, Florida and Alabama have relied on this Court's decisions in *Spaziano* and *Harris* to sentence hundreds of murderers in the intervening decades. Some of those murderers have likely already been executed. Others are presently on death row. "[T]he States' settled expectations deserve our respect." *Ring*, 536 U.S. at 613 (Kennedy, J., concurring). The Court should hesitate before questioning the constitutionality of "reforms designed to reduce unfairness in sentencing." *Id.* (Kennedy, J., concurring). And it should decline to consider overruling precedents where "significant reliance interests are at stake that might justify adhering to their result." *Alleyne*, 133 S. Ct. at 2166 (Sotomayor, J., concurring). Although the petitioner and his supporting *amici* attack these precedents, they have given the Court no reason to doubt their continued viability as good law.

* * *

The States reasonably responded to *Furman* in different ways. Even if some of these responses were unique, the Constitution "is not violated every time a State reaches a conclusion different from a majority of its sisters over how best to administer its criminal laws." *Spaziano*, 468 U.S. at 464. This Court's precedents recognize the constitutionality of Florida's system. And they should not be overruled.

II. History supports the constitutionality of Florida's capital sentencing regime.

The history of the jury's role in capital sentencing also supports the constitutionality of Florida's system. The petitioner and his supporting *amici* erroneously argue that history supports an

expansive role for the jury in capital sentencing. *See* Brief of the ACLU, et al., as *Amici Curiae* in Support of Petitioner. But, as we have explained, Florida's capital sentencing structure was a direct response to *Furman*'s concern about the arbitrariness of unfettered jury discretion. And, far from providing an argument against judicial sentencing in the capital context, the historical analysis shows only that juries were – and remain – integral to the adjudication of guilt or innocence. At sentencing, however, a judge has long played *the* crucial role.

A. Historically, the judge has had the predominant role in sentencing.

The petitioner and *amici* make a hash of sentencing under the common law and during the American colonial period. They confuse the jury's preeminent role in the determination of guilt with its lesser role in determining the sentence. And they draw an unwarranted comparison between single-punishment sentencing structures—where the guilty verdict automatically controls the punishment—and the kind of scaled system employed by Florida here.

Briefly, the jury and judge in Renaissance-era England shared sentencing authority: the judge through direct exertion and the jury indirectly through their power to convict. Erik Lillquist, *The Puzzling Return of Jury Sentencing: Misgivings about* Apprendi, 82 N.C.L. Rev. 621, 630-636 (2004) (hereafter Lillquist, *Puzzling Return of Jury Sentencing*). During this time, the jury's adjudication of guilt and indirect role in sentencing "was constrained and channeled in a number of ways." *Id.* at 630. Judges used their discretion to confer the benefit of the clergy – which made the defendant ineligible for the death sentence – in capital cases; "the jury would have to first decide upon guilt, after which the justice would decide upon the applicability

of the benefit to the case." *Id.* at 631. For less serious, non-capital crimes, "the punishment (and in some cases, the matter of guilt as well) was left solely in the hands of the justices." *Id.* at 636. By the Eighteenth century, "[o]nce a jury convicted a defendant of a nonclergyable offense, the jury could recommend a pardon, but reprieve was left wholly to the justice's discretion." *Id.* at 639.

Unlike in England, juries were *de facto* sentencers in the American colonial period, but that quickly changed for two very good reasons.

First, in the colonial period, most verdicts had only a single associated punishment. There was no need for anyone to exercise sentencing discretion in the early American criminal system "because there was, for the most part, a single punishment" for any given offense. Nancy Gertner, *A Short History of American Sentencing: Too Little Law, Too Much Law, or Just Right*, 100 J. Crim. L. & Criminology 691, 694 (2010) (hereafter Gertner, *A Short History*). The jury had an indirect role in sentencing "through application of its factfinding power," since "[t]he crime under which a defendant was convicted, and therefore the sanction, depended on the particular facts found by the jury in the case." Douglas G. Smith, *The Historical and Constitutional Contexts of Jury Reform*, 25 Hofstra L. Rev. 377, 419 (1996) (hereafter Smith, *Jury Reform*). But, by the turn of the nineteenth century, scalable punishments created a "more complex set of sentencing outcomes" for which "the jury could no longer link conviction to a particular sentence." Gertner, *A Short History* at 694. Judges, not juries, have historically exercised sentencing discretion when a range of punishments are linked to an offense.

Second, in the colonial period, juries were just as expert in the law as the judges. "[F]ew trained

lawyers and little law were to be found in the colonies." Albert Alschuler & Andrew G. Deiss, *A Brief History of Criminal Jury in the United States*, 61 U. Chi. L. Rev. 867, 903 (1994) (hereafter Alschuler & Deiss, *A Brief History*). Moreover, the same group of landowners would serve on multiple juries, providing professionalism and consistency. *See* Gertner, *A Short History* at 692. This balance between juries and judges changed in part because judges became more expert on the law. *See* Lillquist, *Puzzling Return of Jury Sentencing* at 651. "[A]s the judiciary improved, there was less and less reason to leave this power in the hands of juries, and so jury sentencing atrophied." *Id.*

In short, the jury quickly returned to the way it had functioned in England. The conviction stage and the sentencing stage developed "different standards of proof and of evidence," allowing the judge to set the sentence without the limitations of the rules of evidence. Gertner, *A Short History* at 695. Judges developed broad power over sentencing; although "[t]he legislature set the outside limits within which sentencing discretion could be exercised," there were no "specific, detailed criteria to guide judicial sentencing." Alan M. Dershowitz, *Criminal Sentencing in the United States: An Historical and Conceptual Overview*, 423 Annals Am. Acad. Pol. & Soc. Sci. 117, 126 (1976).

B. Historically, jury unanimity is important to the adjudication of guilt, not the imposition of a sentence.

This Court has already held that jury unanimity is not a constitutional requirement. The Court in *Apodaca v. Oregon*, 406 U.S. 404 (1972), held that jury unanimity is not required in the guilt phase. Although *Apodaca* does not address jury unanimity

in a sentencing stage, this Court's historical analysis applies *a fortiorari* to jury sentencing. The Court explained that, "[a]fter a proposal had been made to specify precisely which of the common-law requisites of the jury were to be preserved by the Constitution, the Framers explicitly rejected the proposal and instead left such specification to the future." *Id.* at 410 (plurality opinion). Because unanimity is not constitutionally required in the verdict stage, it makes no sense to require unanimity at the sentencing stage. The petitioner's arguments on that front are barred by this on-point precedent.

Moreover, there is no historically rooted requirement for jury unanimity when the jury has been entrusted with sentencing. Instead, the importance of jury unanimity has always been tied to fact-finding at the conviction stage. *See* Joseph Story, *Commentaries on the Constitution of the United States* 559 n.2 (5th ed. 1891) (noting that the jury "must unanimously concur in the guilt of the accused before a legal *conviction* can be had") (emphasis altered). *See also* John Proffatt, *A Treatise on Trial By Jury* § 77 at 112 (1876) (commenting that "to accept a *verdict* of any number less than the whole" is a foreign concept) (emphasis added). In fact, former members of this Court have suggested that States "replac[e] the requirement of unanimous jury verdicts with majority decisions about sentence[s]" in order to secure greater uniformity in capital sentencing. *See Witherspoon v. State of Ill.*, 391 U.S. 510, 542 n.2 (1968) (White, J., dissenting). The historical developments that underscore the presumption of unanimity at the guilt phase do not demand the same procedural design in sentencing.

III. Important policy considerations support the role of judges in capital sentencing.

States can reasonably conclude that judicial involvement in capital sentencing supports the objectives of consistency, deterrence, and other important public policies. Jury sentencing may have countervailing benefits. But it is also criticized as inconsistent and arbitrary when compared with judicial sentencing. Ultimately, Florida and every other State should have the right to weigh these policy considerations and make a determination for itself.

A. Judicial sentencing is less arbitrary and more consistent than jury sentencing.

In the non-capital context, it is generally accepted that judicial involvement in sentencing makes sentences more consistent. In 1967, the President's Commission on Law Enforcement and Equal Justice recommended that each State be able to decide whether capital punishment was an appropriate sanction. *See* President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* 143 (1967). But the Commission concluded that juries should have no sentencing role in the *non*capital context. "Jurors do not and cannot have the expertise to assess rationally the correctional needs of offenders; and juries, because of their size and their position of being half in and half out of the court system, are inappropriate recipients of sentencing information." *Id.* at 145. Similarly, the American Bar Association, an *amicus* for the petitioner, urges in its literature that "[u]niformity in sentencing is crucial." American

Bar Association, *Handbook of International Standards on Sentencing Procedure* 3 (2010). The ABA argues that "disparity in sentencing may erode the public's confidence in the integrity of the criminal justice system." *Id.* We agree with these goals.

But these insights apply equally to capital sentencing. In the capital context, juries "appear to make decisions in a more prejudiced and biased manner than do judges." Radha Iyengar, *Who's the Fairest in the Land? Analysis of Judge and Jury Death Penalty Decisions*, 54 J.L. & Econ. 693, 716 (2011). Additionally, jury decisions may "more strongly correlated with demographic factors related to the victim, the defendant, and the interaction between these characteristics." *Id.* at 694. But "judges appear to be more likely to be influenced by the choice of weapon, the circumstances of the murder, and the relationship between the victim and the defendant." *Id.* This may make juries "more susceptible to racial bias while being less concerned with the details surrounding the circumstances of the crime." *Id.* at 716. Although "the jury is a vital procedural safeguard in representing society in the determination of guilt or innocence, by its very nature a jury is completely unprepared to determine a complex question such as sentencing." Charles W. Webster, *Jury Sentencing—Grab-Bag Justice*, 14 Sw. L.J. 221, 228 (1960). *See also* Randall R. Jackson, *Missouri's Jury Sentencing Law: A Relic the Legislature Should Lay to Rest*, 55 J. Mo. B. 14, 16 (1999) ("[J]ury sentencing inherently results in unjustly disparate sentences.").

The petitioner and his supporting *amici* cannot explain why the same concerns that support judicial sentencing in other contexts do not apply with equal or greater force in the capital context. In its *amicus* brief, the ABA posits that jury capital sentencing is a better guide to the conscience of the community. Brief of the American Bar Association as *Amicus Curiae* in Support of Petitioner at 21–22. But this factor does not distinguish capital cases from other criminal cases, in which retributive goals are also important. Ultimately, if States can reasonably choose to trust judges with imposing life-without-parole sentences and sentences for terms of years, there is no reason that judges cannot also be trusted to impose capital sentences.

B. Judicial sentencing improves the general deterrent effect of capital punishment.

The only meaningful argument that capital sentencing procedures should, as a policy matter, be different from other kinds of sentencing procedures is that the *only* purpose of the death penalty is retribution. But this conclusion is contrary to numerous studies and the theory of deterrence itself.

As an initial matter, questioning the deterrent effect of the death penalty "is ultimately to question the foundation of general deterrence theory, the idea that the harsher a penalty, the greater the deterrence value." Chad Flanders, *The Case Against the Case Against the Death Penalty*, 16 New Crim. L. Rev. 595, 601 (2013). Because "we by and large [accept general deterrence theory], there is no reason

to suddenly reject it in the death penalty context." *Id.*

Moreover, many statistical analyses have shown a powerful deterrent effect to the death penalty.[3] According to Judge Richard Posner, these empirical analyses demonstrate "a substantial incremental deterrent effect of capital punishment" that "coincides with the common-sense of the situation," as "it is exceedingly rare for a defendant who has a choice to prefer being executed to being imprisoned for life." Richard A. Posner, *The Economics of Capital Punishment*, 3 The Economists' Voice, Issue 3 (2006). Indeed, "on certain empirical assumptions, capital punishment may be morally required, not for retributive reasons, but rather to prevent the taking of innocent lives." Cass R. Sunstein & Adrian Vermuele, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 Stan. L. Rev. 703, 705 (2005).

---

[3] *See, e.g.*, Hashem Dezhbakhsh et al., *Does Capital Punishment Have a Deterrent Effect? New Evidence from Postmoratorium Panel Data*, 5 Am. L. & Econ. Rev. 344 (2003); H. Naci Mocan & R. Kaj Gittings, *Getting Off Death Row: Commuted Sentences and the Deterrent Effect of Capital Punishment*, 46 J.L. & Econ. 453 (2003); Joanna M. Shepherd, *Deterrence Versus Brutalization: Capital Punishment's Differing Impacts Among States*, 104 Mich. L. Rev. 203 (2005); Joanna M. Shepherd, *Murders of Passion, Execution Delays, and the Deterrence of Capital Punishment*, 33 J. Legal Stud. 283 (2004); Paul R. Zimmerman, *Estimates of the Deterrent Effect of Alternative Execution Methods in the United States: 1979-2000*, 65 Am. J. Econ. & Soc. 909 (2006); Paul R. Zimmerman, *State Executions, Deterrence, and the Incidence of Murder*, 7 J. Applied Econ. 163 (2004).

Anecdotal evidence also provides support for this conclusion. Senator Diane Feinstein, who served on a parole board in the 1960s, recounted an experience involving a woman who had carried an unloaded gun into a store robbery. The woman testified that she kept the weapon unloaded to make sure she did not panic, accidentally kill someone, and thus become eligible for the death penalty. 141 Cong. Rec. S7662 (June 5, 1995) *see also* S. Rep. 107-315, at 62-63 (2002) (recounting anecdotal testimony about the deterrent effect of capital punishment). And, in 2011, a man conducted research to ensure that Illinois did not have the death penalty before he killed his ex-girlfriend. Art Barnum and Ted Gregory, *Woman slain in Oak Brook parking lot*, Chi. Trib., Apr. 14, 2011.[4] This murder may not have happened if the murderer knew he could be eligible for the death penalty.

In short, judicial involvement in sentencing increases the consistency in the application of the death penalty. It recognizes "the legal potential for a judge to rationally update beliefs based on evidence relevant to an estimate of the offender's deterrability by prison." Charles N. W. Keckler, *Life v. Death: Who Should Capital Punishment Marginally Deter?*, 2 J.L. Econ. & Pol'y 51, 101 (2006). And, unlike a jury, a judge's sentencing decision can account for "localized deterrence in communities or upon certain type of murders." Iyengar, *Who's the Fairest in the Land? Analysis of Judge and Jury Death Penalty*

---

[4] Available at http://articles.chicagotribune.com/2011-04-14/news/ct-met-oak-brook-murder-0415-20110414_1_state-s-attorney-robert-berlin-death-penalty-oak-brook. (last visited on August 3, 2015).

Decisions at 717. Florida's choice to involve the judge in the sentencing decision is amply supported by public policy.

* * *

The Court should reject the petitioner's broadside attack on Florida's capital sentencing structure. Accepting the arguments of the petitioner and his supporting *amici* would upset established precedent. It would undermine state attempts to infuse their capital systems with structure and consistency. And it would require accepting the historical fiction that rules about the adjudication of guilt necessarily apply to the imposition of a sentence. There are good reasons for entrusting judges with a role in imposing sentences. Florida's decision to do so should be respected.

CONCLUSION

This Court should affirm the decision of the Supreme Court of Florida.

Respectfully submitted,

Luther Strange
Alabama Attorney General

Andrew L. Brasher
Solicitor General
Counsel of Record

Megan A. Kirkpatrick
Deputy Solicitor General

OFFICE OF THE ALABAMA
ATTORNEY GENERAL
501 Washington Ave.
Montgomery, AL 36130
(334) 242-7300
abrasher@ago.state.al.us

August 5, 2015

Supreme Court, U.S.
FILED
JUN - 4 2015
OFFICE OF THE CLERK

No. 14-7505

In the Supreme Court of the United States

TIMOTHY LEE HURST,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Writ of Certiorari to the Supreme Court of Florida

BRIEF OF *AMICUS CURIAE* AMERICAN BAR ASSOCIATION IN SUPPORT OF PETITIONER

Of Counsel:
RORY K. LITTLE
THOMAS J. TYNAN
SAURISH BHATTACHARJEE

WILLIAM C. HUBBARD
Counsel of Record
PRESIDENT
AMERICAN BAR ASSOCIATION
321 North Clark Street
Chicago, IL 60654
(312) 988-5000
abapresident@americanbar.org

Counsel for Amicus Curiae American Bar Association

June 4, 2015

Becker Gallagher Cincinnati, OH Washington, D.C. 800.890.5001

CAPITAL CASE

QUESTION PRESENTED

Whether Florida's death sentencing scheme violates the Sixth Amendment or the Eighth Amendment in light of this Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002).

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 7

ARGUMENT 9

I. A Capital Sentencing Jury Should Not Be Permitted to Find and Weigh Aggravating Factors, or Recommend or Decide that a Death Sentence Should Be Imposed, Except by Unanimous Vote. 10

II. When a Capital Defendant Has Not Waived the Right to a Jury, a Death Sentence Should Not Be Imposed Based on an Independent Determination by the Court. 18

CONCLUSION 22

APPENDIX

Resolution 108A and Report, American Bar Association (February 2015) ABA App. 1

TABLE OF AUTHORITIES

CASES

Apprendi v. New Jersey,
530 U.S. 466 (2000) 10

Burch v. Louisiana,
441 U.S. 130 (1979) 14

Criminal Specialist Investigations, Inc. v. State,
58 So. 3d (Fla. 2011) 5

Ex parte McGriff,
908 So. 2d 1024 (Ala. 2004) 13

Gregg v. Georgia,
428 U.S. 153 (1976) 13, 21

Hildwin v. Florida,
490 U.S. 638 (1989) 12

Jones v. United States,
526 U.S. 227 (1999) 12

McKoy v. North Carolina,
494 U.S. 433 (1990) 18

People v. Prieto,
30 Cal. 4th 226 (Cal. 2003) 14

Prieto v. Commonwealth,
682 S.E.2d 910 (Va. 2009) 13

Ring v. Arizona,
536 U.S. 584 (2002) *passim*

Rompilla v. Beard,
545 U.S. 374 (2005) 5

Russ v. State,
73 So. 3d (Fla. 2011) 20

State v. Steele,
921 So. 2d 538 (Fla. 2006) *passim*

Walton v. Arizona,
497 U.S. 639 (1990) 20

Wiggins v. Smith,
539 U.S. 510 (2003) 5

Witherspoon v. Illinois,
391 U.S. 510 (1968) 1

CONSTITUTION

U.S. Const. amend. VI 7, 9, 10, 13

U.S. Const. amend. VIII *passim*

STATUTES

42 Pa. Cons. Stat. Ann. 9711(f)(1) (West 2015) 13

Ala. Code 13A-5-47(d) (1975) 13

Ariz. Rev. Stat. 13-752(E) 13

California Penal Code 190.4 14

Fla. Stat. Ann. 921.141(3) 20

Fla. Stat. Ann. 921.141(5) 10

Ga. Code. Ann. 17-10-30(c) (West 2012) 13

Ind. Code 35-50-2-9(d) (West 2014) 13

Ky. Rev. Stat. Ann. 532.025(3) (West 2012) . 13

Mo. Ann. Stat. 565.030(4) (West 2014) 13

Ohio Rev. Code Ann. 2929.03(B) (West 2008) 13

Tenn. Code Ann. 39-13-204(g)(2)(A) (West 2014) 13

Tex. Code Crim. Proc. art. 37.071 (1991) 13

RULES

Sup. Ct. R. 37.6 1

OTHER AUTHORITIES

ABA Criminal Justice Standards, Standard 15-1.1, *available at* http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_jurytrial_blk.html 3, 4, 17

ABA Criminal Justice Standards, Standard 15-1.1(c), *available at* http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_jurytrial_blk.html 4

ABA Death Penalty Due Process Review Project, http://www.americanbar.org/groups/individual_rights/projects/death_penalty_due_process_review_project.html 5

ABA, Death Without Justice: A Guide for Examining the Administration of the Death Penalty in the United States (June 2001), *available at* http://www.americanbar.org/content/dam/aba/migrated/irr/finaljune28.authcheckdam.pdf 5, 6

American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, 31 Hofstra L. Rev. 913 (2003), *available at* http://www.ambar.org/2003Guidelines 5

ABA Jurisdictional Assessments Chapters and Recommendations (Jan. 2010), *available at* http://www.americanbar.org/content/dam/aba/migrated/2011_build/death_penalty_moratorium/protocols2010.authcheckdam.pdf 6

ABA Leadership, House of Delegates, *General Information*, http://www.americanbar.org/groups/leadership/house_of_delegates.html 2

ABA Mission and Association Goals, http://www.americanbar.org/about_the_aba/aba-mission-goals.html 1

ABA Policy 134 (adopted Aug. 1974) 3

ABA Principles for Juries and Jury Trials, Principle 4. B., *available at* http://www.americanbar.org/content/dam/aba/migrated/juryprojectstandards/principles.authcheckdam.pdf 4, 17

ABA Representation Project, http://www.americanbar.org/groups/committees/death_penalty_representation.html 4

ABA Representation Project, *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*, *available at* http://www.ambar.org/1989Guidelines 4

ABA Review Project, "Evaluating Fairness and Accuracy in State Death Penalty Systems: The Florida Death Penalty Assessment," http://www.americanbar.org/groups/individual_rights/projects/death_penalty_due_process_review_project/state_death_penalty_assessments/florida.html *passim*

ABA, Standards of Judicial Administration Relating to Trial Courts, Standard 2.10(b) (1992 ed.) (first published in 1976), *available at* http://www.americanbar.org/content/dam/aba/migrated/divisions/Judicial/MO/MemberDocuments/trialcourtstandards.authcheckdam.pdf 3

ABA Standards Relating to Trial Courts, available at http://www.americanbar.org/content/dam/aba/migrated/divisions/Judicial/MO/MemberDocuments/trialcourtstandards.authcheckdam.pdf 17

ABA State Death Penalty Assessments, http://www.americanbar.org/groups/individual_rights/projects/death_penalty_due_process_review_project/state_death_penalty_assessments.html 6

ABA Supports Florida Legislation to Require Unanimity in Death Penalty Verdicts and Sentencing, http://www.americanbar.org/news/abanews/aba-news-archives/2015/03/aba_supports_florida.html 12

Brief of Amicus Curiae American Bar Association in *Lee v. Louisiana*, No. 07-1523 (June 7, 2008), *available at* http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_news_leevslouisiana.authcheckdam.pdf 17

Raoul G. Cantero and Robert M. Kline, *Death is Different: The Need for Jury Unanimity in Death Penalty Cases*, 22 St. Thomas L. Rev. 4 (2009) 11, 16, 19

Florida Assessment, http://www.americanbar.org/content/dam/aba/migrated/moratorium/assessmentproject/florida/report.authcheckdam.pdf 14

Ross Kleinstuber, *"Only a Recommendation": How Delaware Capital Sentencing Law Subverts Meaningful Deliberations and Jurors' Feelings of Responsibility*, 19 Widener L. Rev. 321 (2013) 21

Michael J. Sacks, *What Do Jury Experiments Tell Us About How Juries (Should) Make Decisions?*, 6 S. Cal. Interdisc. L.J. 1 (1997) 16

Scott E. Sundby, *War and Peace in the Jury Room: How Capital Juries Reach Unanimity*, 62 Hastings L. J. 103 (2010) 16

Kim Taylor-Thompson, *Empty Votes In Jury Deliberations*, 113 Harv. L. Rev. 1261 (2000) 16

INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae the American Bar Association ("ABA") respectfully submits this brief in support of Petitioner. Although the ABA takes no position on the death penalty *per se*, the ABA urges that Florida's capital sentencing system does not comply with this Court's holding in *Ring v. Arizona*, 536 U.S. 584 (2002). Where a capital defendant has not waived his or her right to a jury, the ABA submits that compliance with *Ring* requires that a jury's vote on any aggravating circumstance necessary to allow a death sentence must be unanimous. The ABA also submits that the jury's recommendation or decision that a death sentence should be imposed must be unanimous. Unanimity, the ABA urges, is required to ensure that a death sentence is rendered as the result of the jury's full deliberation as the "conscience of the community,"[2] and within the requirements of the Constitution.

The ABA is committed to "[w]ork[ing] for just laws, including human rights, and a fair legal process," and "[a]ssur[ing] meaningful access to justice for all persons."[3] With nearly 400,000 members from all fifty

---

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* certifies that no counsel for a party authored this brief in whole or in part, and no person other than *amicus*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

[2] *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968).

[3] *ABA Mission and Association Goals*, http://www.americanbar.org/about_the_aba/aba-mission-goals.html (last visited June 2, 2015).

states and other jurisdictions, the ABA is the leading association of legal professionals and one of the largest voluntary professional membership organizations in the United States. Its members include prosecutors, public defenders, and private defense counsel. They also include attorneys in law firms, corporations, non-profit organizations, and government agencies, as well as judges, legislators, law professors, law students, and non-lawyer "associates" in related fields.[4] From Florida, ABA membership includes 18,537 lawyers, 2,653 law students, and 528 associates.

The position taken in this amicus brief represents the consensus of this diverse membership. It is founded on over forty years of study of the jury's role in our criminal justice system and was adopted by the ABA's House of Delegates ("HOD") as ABA Policy 108A during its Midyear Meeting in February 2015.[5] This Policy calls for governments that impose capital punishment to require that:

---

[4] Neither this brief nor the decision to file it should be interpreted as reflecting the views of any judicial member of the ABA. No member of the ABA Judicial Division Council participated in this brief's preparation or in the adoption or endorsement of the positions in it.

[5] ABA Policy 108A was presented to the HOD as Resolution with Report 108A, a full copy of which is reprinted as the Appendix to this Brief ("ABA App."). Only Resolutions adopted by vote of the HOD become ABA policy. The HOD is composed of 560 delegates representing states and territories, state and local bar associations, affiliated organizations, ABA sections and divisions, and the Attorney General of the United States, among others. *See* ABA Leadership, House of Delegates, *General Information*, http://www.americanbar.org/groups/leadership/house_of_delegates.html (last visited June 2, 2015).

> (1) Before a court can impose a sentence of death, a jury must unanimously recommend or vote to impose that sentence; and
>
> (2) The jury in such cases must also unanimously agree on the existence of any fact that is a prerequisite for eligibility for the death penalty and on the specific aggravating factors that have each been proven beyond a reasonable doubt.

ABA App. 1.

ABA Policy 108A is the latest in a continuum of ABA policies that support jury unanimity in criminal trials. In 1974, the ABA adopted policy stating that the ABA is "opposed to the concept of less than unanimous verdicts in federal criminal cases."[6] This policy is reflected, *inter alia*, in Standard 2.10(b) of the *ABA Standards of Judicial Administration Relating to Trial Courts*,[7] Standard 15-1.1 of the *ABA Criminal Justice*

---

[6] ABA Policy 134 (adopted Aug. 1974), available from the ABA.

[7] *ABA, Standards of Judicial Administration Relating to Trial Courts*, Standard 2.10(b) (1992 ed.) (first published in 1976), *available at* http://www.americanbar.org/content/dam/aba/migrated/divisions/Judicial/MO/MemberDocuments/trialcourtstandards.authcheckdam.pdf ("Criminal Cases. . . . The verdict of the jury should be unanimous.").

Standards,[8] and in Principle 4 of the *ABA Principles for Juries and Jury Trials*.[9]

In 1986, the challenges inherent in capital litigation led the ABA to create the Death Penalty Representation Project ("ABA Representation Project").[10] For nearly thirty years, the ABA Representation Project has worked to improve the quality and availability of counsel through all stages of capital litigation, from arrest through post-conviction collateral review. The ABA Representation Project issued *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* ("*Guidelines*"), which became ABA policy in 1989.[11] The ABA adopted a revised and expanded edition of the Guidelines in

---

[8] *ABA Criminal Justice Standards*, Standard 15-1.1(c), *available at* http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_jurytrial_blk.html ("The verdict of the jury should unanimous").

[9] *ABA Principles for Juries and Jury Trials*, Principle 4. B., *available at* http://www.americanbar.org/content/dam/aba/migrated/juryprojectstandards/principles.authcheckdam.pdf ("A unanimous decision should be required in all criminal cases heard by a jury").

[10] Information on the Death Penalty Representation Project is available at http://www.americanbar.org/groups/committees/death_penalty_representation.html (last visited June 2, 2015).

[11] *Available at* http://www.ambar.org/1989Guidelines (last visited June 2, 2015).

2003,[12] and they have been cited by hundreds of state and federal courts.[13] The ABA Representation Project has also recruited and trained hundreds of ABA members as volunteer attorneys to represent defendants in capital cases.

In 2001, the ABA launched its Death Penalty Due Process Review Project ("ABA Review Project") to conduct research and educate the public and decision-makers on the operation of capital jurisdictions' death penalty laws and processes.[14] The ABA Review Project has completed in-depth assessments for twelve states, designed to provide policy-makers in each state an objective instrument to evaluate their state's death penalty system, by comparing actual practices in the state with a series of recommendations based on the 2001 *ABA Protocols on the Administration of Capital Punishment* and the revised 2010 version of the *Protocols*.[15] The state-based assessment teams were

---

[12] *American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*, 31 Hofstra L. Rev. 913, 923 (2003), *available at* http://www.ambar.org/2003Guidelines.

[13] *See, e.g.*, *Rompilla v. Beard*, 545 U.S. 374, 387 n. 7 (2005); *Wiggins v. Smith*, 539 U.S. 510, 524 (2003); *Criminal Specialist Investigations, Inc. v. State*, 58 So. 3d 883, 886 (Fla. 2011).

[14] Information on the ABA's Death Penalty Due Process Review Project and its jurisdictional assessments is available at http://www.americanbar.org/groups/individual_rights/projects/death_penalty_due_process_review_project.html (last visited June 2, 2015).

[15] ABA, *Death Without Justice: A Guide for Examining the Administration of the Death Penalty in the United States* (June

composed of academics, prosecutors, defense counsel, current and former judges, state bar representatives and state legislators, who lent their expertise and made specific recommendations for reform.[16]

The ABA Review Project completed its assessment of Florida's death penalty system in 2006, "Evaluating Fairness and Accuracy in State Death Penalty Systems: The Florida Death Penalty Assessment" ("Florida Assessment").[17] Among the ABA Review Project's recommendations was that "[t]he State of Florida should require that the jury's sentencing verdict in capital cases be unanimous and, when the sentencing verdict is a death sentence, that the jury reach unanimous agreement on at least one aggravating circumstance." Florida Assessment at 308.[18]

2001), *available at* http://www.americanbar.org/content/dam/aba/migrated/irr/finaljune28.authcheckdam.pdf; *ABA Jurisdictional Assessments Chapters and Recommendations* (Jan. 2010), *available at* http://www.americanbar.org/content/dam/aba/migrated/2011_build/death_penalty_moratorium/protocols2010.authcheckdam.pdf.

[16] *See generally ABA State Death Penalty Assessments*, http://www.americanbar.org/groups/individual_rights/projects/death_penalty_due_process_review_project/state_death_penalty_assessments.html (last visited June 2, 2015).

[17] The Florida Assessment is available at http://www.americanbar.org/groups/individual_rights/projects/death_penalty_due_process_review_project/state_death_penalty_assessments/florida.html (last visited June 2, 2015).

[18] The Florida Assessment is discussed further in the Argument, below.

The ABA's longstanding commitment to the development of balanced policies regarding the criminal justice system, and for capital sentencing specifically, provides it with a deep respect for the role that juries play in assuring that sentences, especially death sentences, fully comply with constitutional requirements. The ABA therefore presents this *Amicus Curiae* brief.

SUMMARY OF ARGUMENT

The ABA submits that, in light of this Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002), Florida's death sentencing system should be held to be unconstitutional under the Sixth and Eighth Amendments. Unique among all capital punishment jurisdictions in the United States, Florida is the only jurisdiction that allows a jury to determine by majority vote both whether aggravating circumstances have been proved beyond a reasonable doubt *and* to recommend a sentence of death. Further, Florida does not require that the majority agree on *which* aggravating factor exists, or even on a single aggravating factor. And the majority does not report which aggravator(s) it finds to the judge, but reports only its recommendation. The Florida Supreme Court has concluded this is sufficient "fact-finding" because in coming to a recommendation that a death sentence be imposed, the jury has necessarily found that at least one aggravating factor has been proved.

The ABA submits that this is not jury "fact-finding" as required by *Ring*. And an extensive body of research and the ABA's forty-plus years of study of the jury's role in our criminal system has established, *inter alia*, that when only a majority vote is required, jurors do

not devote as much time, energy or emotional commitment to the punishment decision, and pro-death jurors are often able to mute the concerns of undecided or life sentence jurors by noting that a mere majority is needed to impose death.

Further, the Florida death penalty system requires that after the judge receives the recommendation of the jury – without any specification of what aggravating factors received a vote – the judge must then independently determine the existence of aggravating and mitigating circumstances, the weight to be given to each, and the sentence to be imposed. Again, the ABA submits that this is not jury "fact-finding," as required by *Ring*. And empirical research shows that, where a capital sentencing jury's recommendation is "advisory," the jurors often do not feel responsible for the sentences that they recommend, and the penalty phase deliberations are often exceedingly brief, with little discussion of the evidence.

The ABA submits that, when capital sentencing jurors do not feel responsible for the sentences they recommend, they cannot fulfill their constitutional duty as "the conscience of the community." The ABA accordingly urges this Court to rule that Florida's capital sentencing system is unconstitutional, and that only a jury's unanimous, unqualified vote on specific aggravating circumstances, as well as on any recommendation or decision for death, should be sufficient.

ARGUMENT

There is no dispute that Florida's capital sentencing system is unique among all capital punishment jurisdictions in the United States. *See* Petitioner's Brief ("Pet. Br.") at 43. As stated by the Florida Supreme Court, "Florida is now the only state in the country that allows a jury to decide that aggravators exist *and* to recommend a sentence of death by a mere majority vote." *State v. Steele*, 921 So. 2d 538, 548 (Fla. 2006) (emphasis in original). In fact, every other state that has the death penalty now requires jury unanimity either for the finding of aggravating factors or for the jury's vote that death is appropriate, and the vast majority of states require unanimity for both.

Although the ABA takes no position on the death penalty *per se*, the ABA submits that the Sixth and Eighth Amendment considerations set out in *Ring* and other precedents, as well as the large and consistent body of empirical research and the ABA's forty-plus years of study of the jury's role in our criminal justice system, support the ABA's conclusion that a jury's majority vote is not sufficient. The ABA submits that eligibility for a death sentence should not be permitted where even one penalty-phase juror remains unconvinced that each aggravating factor that is a prerequisite to a death sentence has been proved beyond a reasonable doubt, or where that juror – or possibly a different juror – remains unconvinced that the jury's weighing of aggravating and mitigating circumstances has established a constitutionally sufficient basis on which the jury should recommend or decide that the defendant receive the ultimate

punishment. The ABA urges that only a jury's unanimous, unqualified vote should be sufficient.

The ABA also submits that when a capital defendant has not waived his or her right to a jury trial, Florida should not be permitted to require that the judge cannot know what factors the jury found and instead, must independently find and weigh the aggravating and mitigating factors, and arrive at the defendant's sentence. The ABA urges that in this requirement, Florida's death sentencing system also does not comply with the constitutional requirements of the Sixth and Eighth Amendments.

I. A Capital Sentencing Jury Should Not Be Permitted to Find and Weigh Aggravating Factors, or Recommend or Decide that a Death Sentence Should Be Imposed, Except by Unanimous Vote.

In *Ring v. Arizona*, this Court concluded that in capital sentencing, when "aggravating factors operate as the functional equivalent of an element of a greater offense, the Sixth Amendment requires that they be found by a jury." 536 U.S. at 609 (internal quotation marks and citation to *Apprendi v. New Jersey*, 530 U.S. 466, 494 n.19 (2000) omitted).

Under Florida law, the aggravating circumstances that must be found before a death sentence may be imposed are enumerated in the Florida statute, Florida Statutes Annotated ("FSA") 921.141(5). In *State v. Steele*, *supra*, the Florida Supreme Court instructed that the required aggravators may be found "by a mere majority vote." 921 So. 2d at 548. That court also instructed that nothing in Florida statutory law, its

standard jury instructions, or its standard verdict form "requires a majority of the jury to agree on *which* aggravating circumstances exist." 921 So. 2d at 548. The Florida Court continued:

> [T]he jury may recommend a sentence of death where four jurors believe that only the "avoiding a lawful arrest" aggravator applies, while three others believe that only the "committed for pecuniary gain" aggravator applies, because seven jurors believe that at least one aggravator applies. The [trial court's] order in this case, however, requires a majority vote for at least one particular aggravator.

Id. (internal statutory citations omitted).

In fact, a majority of a Florida jury is not required to agree on a single aggravating factor, and instead could find that sufficient aggravating circumstances exist even if only one juror votes for – that is, when the vote is 11-1 *against* – each specific aggravator that is considered. As former Florida Supreme Court Justice Raoul G. Cantero explained, "The jury may still recommend a death sentence even if each juror believes that a different aggravator was proven." Raoul G. Cantero and Robert M. Kline, *Death is Different: The Need for Jury Unanimity in Death Penalty Cases*, 22 St. Thomas L. Rev. 4, 9 (2009).

In addition, a Florida jury reports only its recommendation to the judge, and is not permitted to report which aggravator(s) it finds. This is sufficient, according to the *Steele* Court, because a jury is "'necessarily engaging in the factfinding required for imposition of a higher sentence, that is, the

determination that at least one aggravating factor had been proved.'" 921 So. 2d at 546 (quoting *Jones v. United States*, 526 U.S. 227, 250-51 (1999) (referencing *Hildwin v. Florida*, 490 U.S. 638 (1989))). As the *Steele* Court stated, "The requirement of a majority vote on each aggravator is also an unnecessary expansion of *Ring*." 921 So. 2d at 546.

Florida's capital sentencing system is unique among all 33 American jurisdictions that permit capital punishment.[19] Indeed, the Florida Supreme Court has characterized Florida as "the outlier state," stating that "Florida is now the only state in the country that allows the death penalty to be imposed even though the penalty-phase jury may determine by a mere majority vote both whether aggravators exist *and* whether to recommend the death penalty." *Steele*, 921 So. 2d at 550 (emphasis in original). And although the *Steele* Court urged its state legislature to address this situation almost a decade ago, *id.* at 548-50, Florida remains without legislation that would bring its death penalty system into compliance with *Ring*.[20]

---

[19] This includes the 31 States that authorize the death penalty as of May 28, 2015, as well as the Federal and U.S. military systems.

[20] The ABA and its members in Florida have continued to raise awareness of this issue, including as recently as March 2015 when the ABA President wrote to Florida legislators and encouraged them to adopt the over-due changes to Florida's death sentencing scheme. *See ABA Supports Florida Legislation to Require Unanimity in Death Penalty Verdicts and Sentencing*, http://www.americanbar.org/news/abanews/aba-news-archives/2015/03/aba_supports_florida.html (last visited, June 2, 2015).

With full respect for the diversity among States that our federal system enshrines, the ABA submits that Florida's system of requiring only a majority vote – as well as the requirement that Florida juries may not report which, if any, aggravating circumstance(s) they find – means the Sixth Amendment protections set out in *Ring* cannot be assured, and a reviewing court cannot determine whether the constitutional requirements, including due process and Eighth Amendment requirements, have been met. *Cf. Gregg v. Georgia*, 428 U.S. 153, 195 (1976) (opinion of Stewart, Powell, and Stevens, JJ.) (suggesting that requiring a capital "sentencing authority to specify the factors it relied upon" may be necessary to avoid unconstitutional arbitrariness).[21]

The ABA submits that, instead, Florida's capital sentencing juries should be required to find any such aggravating factors by unanimous – and not by majority, or even singular – vote, and to specify the factors so found. As Petitioner demonstrates, since *Steele* was decided in 2006, Florida has become the only capital punishment state that does not require jury

---

[21] In fact, of the twelve state capital systems for which the ABA Review Project has completed assessments, ten require special jury findings on specific aggravators, most by a special verdict form. *See* Ariz. Rev. Stat. 13-752(E); Ga. Code. Ann. 17-10-30(c) (West 2012); Ind. Code 35-50-2-9(d) (West 2014); Ky. Rev. Stat. Ann. 532.025(3) (West 2012); Mo. Ann. Stat. 565.030(4) (West 2014); Ohio Rev. Code Ann. 2929.03(B) (West 2008); 42 Pa. Cons. Stat. Ann. 9711(f)(1) (West 2015); Tenn. Code Ann. 39-13-204(g)(2)(A) (West 2014); Tex. Code Crim. Proc. art. 37.071 (1991); *Prieto v. Commonwealth*, 682 S.E.2d 910, 935 (Va. 2009). Florida and Alabama remain outliers in this regard. *See* Ala. Code 13A-5-47(d) (1975); *Ex parte McGriff*, 908 So. 2d 1024 (Ala. 2004).

unanimity on aggravating factors, either to make a defendant death eligible or to impose a death sentence. Pet. Br. at 43 & n.15.[22]

As this Court has stated, the "near-uniform judgment of the Nation provides a useful guide in delimiting the line between those jury practices that are constitutionally permissible and those that are not." *Burch v. Louisiana*, 441 U.S. 130, 138 (1979). The line is particularly clear in this case.

Indeed, in the Executive Summary to its Florida Assessment, the ABA Review Project stated that two "problems areas" were "Significant Capital Juror Confusion" and "Lack of Unanimity in Jury's Sentencing Decisions in Capital Cases." Florida Assessment at vi.[23] The Project cited research showing that many Florida capital jurors did not understand their role and responsibilities when deciding whether to impose a death sentence. *Id.* at x. They were often confused about components of capital sentencing, including how they were to conduct the statutorily required weighing of aggravation and mitigation

---

[22] In addition to Utah and Virginia authorities that Petitioner cites (Pet. Br. at 43 n.15), *see* California Penal Code 190.4 (capital jury must "make a special finding on the truth of each alleged special circumstance"). Also, unlike in Florida, capital juries in Utah, Virginia, and California must then *unanimously* recommend the death penalty. *See Steele*, 921 So. 2d at 549 (citing Utah and Virginia cases and statutes); *People v. Prieto*, 30 Cal. 4th 226, 275 (Cal. 2003).

[23] The Florida Assessment is available at http://www.americanbar.org/content/dam/aba/migrated/moratorium/assessmentproject/florida/report.authcheckdam.pdf (last visited June 2, 2015).

evidence to arrive at their recommendation. *Id.* at 305. For example, over 35 percent of the interviewed Florida capital jurors did not understand that they could consider any evidence in mitigation; 48.7 percent believed that the defense had to prove mitigating factors beyond a reasonable doubt; and 36 percent believed they were required to sentence the defendant to death if they found the defendant's conduct to be "heinous, vile, or depraved." *Id.* at vi. In addition, in its Florida Assessment, the ABA Review Project noted that, despite data showing a severe misunderstanding of the jury instructions on aggravating and mitigating circumstances, only 6 percent of the jurors interviewed believed they had difficulty understanding the jury instructions, and only 21.6 percent even asked the judge for clarification. *Id.* at 305.

The Florida Assessment also cited research positing that meaningful deliberation by capital sentencing juries was discouraged by Florida's practice of not requiring a unanimous jury recommendation for a death sentence. *Id.* The Assessment cited narrative accounts of juror interviews that indicated (1) jurors did not devote much time, energy, or emotional commitment to the punishment decision; and (2) pro-death jurors were able to mute the concerns of undecided or life sentence jurors by noting that a mere majority was needed to impose death. *Id.* at 306. One juror even recounted that when a few jurors indicated opposition to recommending death, the jury simply discussed that the decision did not have to be unanimous and called for a vote. *Id.*

Thus, as former Florida Supreme Court Justice Cantero has written, non-unanimous jury procedures

"invariably empower superficial, narrow, and prejudiced arguments." Cantero & Kline, *supra*, at 31-32; *see also* Kim Taylor-Thompson, *Empty Votes In Jury Deliberations*, 113 Harv. L. Rev. 1261, 1272 (2000) (research demonstrates that "majority rule discourages painstaking analyses of the evidence and steers jurors toward swift judgments that too often are erroneous or at least highly questionable"); *see generally* Scott E. Sundby, *War and Peace in the Jury Room: How Capital Juries Reach Unanimity*, 62 Hastings L. J. 103 (2010) (research demonstrates that a unanimity requirement leads to a substantively different and often multi-staged deliberative process).

Research also shows that if there is no requirement that the decision be unanimous, individual jurors are less confident in their decisions. *See, e.g.*, Michael J. Sacks, *What Do Jury Experiments Tell Us About How Juries (Should) Make Decisions?*, 6 S. Cal. Interdisc. L.J. 1, 41 (1997) ("[T]he existence of dissenters left even the majority with some lingering doubts that it had reached the right verdict."). As the ABA Review Project concluded: "The State of Florida should require that the jury's sentencing verdict in a capital case be unanimous and, when the sentencing verdict is a death sentence, that the jury reach unanimous agreement on at least one aggravating circumstance." Florida Assessment at x.

The ABA urges, based on its four-plus decades of empirical research and study, including the Florida Assessment, that a capital sentencing jury should not be permitted to make its determination by a majority vote. *See, e.g.*, ABA App. 6-11, 11-14. Instead, each penalty-phase juror should be convinced that each

aggravating factor that is used to support a death sentence has been proved beyond a reasonable doubt, and a death sentence should not constitutionally be permitted if any juror remains unconvinced that the jury's weighing of aggravating and mitigating circumstances has established a constitutionally sufficient basis on which the jury should recommend or decide for death.

The ABA urges that only a requirement of unanimity on these aspects is sufficient because, *inter alia*, it "encourages jurors to devote more time and thought to deliberations, and empowers minority jurors to voice their opinions and fully participate in the process," and it "increases the reliability of jury determinations." ABA App. at 8.[24]

---

[24] The ABA has long asserted that unanimity should be required in all jury verdicts. *See* Brief of Amicus Curiae American Bar Association in *Lee v. Louisiana*, No. 07-1523 (June 7, 2008), *available at* http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_news_leevslouisiana.authcheckdam.pdf (discussing empirical research on non-unanimous jury verdicts); *see also ABA Standards Relating to Trial Courts*, *available at* http://www.americanbar.org/content/dam/aba/migrated/divisions/Judicial/MO/MemberDocuments/trialcourtstandards.authcheckdam.pdf (calling for unanimous jury verdicts in all criminal cases); *ABA Criminal Justice Standards*, Standard 15-1.1, *available at* http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_jurytrial_blk.html (calling for unanimous jury verdicts in all cases "in which confinement in jail or prison may be imposed"); *ABA Principles for Juries and Jury Trials*, Principle 4. B., *available at* http://www.americanbar.org/content/dam/aba/migrated/juryprojectstandards/principles.authcheckdam.pdf ("unanimous decision should be required in all criminal cases heard by a jury").

As Justice Kennedy has noted, "[j]ury unanimity . . is an accepted, vital mechanism to ensure that real and full deliberation occurs . and that the jury's ultimate decision will reflect the conscience of the community." *McKoy v. North Carolina*, 494 U.S. 433, 452 (1990) (Kennedy, J., concurring in the judgment).[25] In capital cases in which the sentencing jury must deliberate "on the existence of any fact that is a prerequisite for eligibility for the death penalty and on the specific aggravating factors that have each been proven beyond a reasonable doubt," ABA App. 1, the ABA urges that jury unanimity must be required.

II. When a Capital Defendant Has Not Waived the Right to a Jury, a Death Sentence Should Not Be Imposed Based on an Independent Determination by the Court.

The ABA submits that implicit in this Court's holding in *Ring* is that, when a capital defendant has not waived his or her right to a jury trial, the court cannot impose a death sentence unless that sentence is based on one or more aggravating factors that the jury has identified as proved beyond a reasonable doubt. Under Florida's system, however, not only does the judge not know what factors the jury found, but Florida law requires that the judge must independently find and weigh factors to arrive at the defendant's sentence.

---

[25] In *McKoy*, this Court held that capital jurors cannot be required to be unanimous regarding the existence of *mitigating* factors. 494 U.S. at 443. But the Court rejected any notion that there must be "symmetry" regarding requirements for jury findings of aggravating factors. *Id.*; *accord id.* at 452 (Kennedy, J., concurring).

As discussed above (pp. 10-11), a capital sentencing jury in Florida may make its sentencing recommendation based on a majority vote, and may do so without agreeing on *which* aggravating circumstances exist – it may even recommend a death sentence when each juror believes that a different aggravator was proven. Cantero & Kline, 22 St. Thomas L. Rev. at 9. While the ABA contends that the jury should be required to unanimously agree on each necessary aggravating factor, the ABA also urges that Florida's capital sentencing system has an additional significant problem: as the *Steele* Court concluded, Florida law prohibits a trial court from even asking the jury to specify – through a special verdict form or otherwise – the aggravating circumstances on which the jury has based its recommendation. *Steele,* 921 So. 2d at 550. Instead, the trial judge must "independently determine the existence of aggravating and mitigating circumstances, and the weight to be given to each" in determining a capital defendant's sentence. *Id.* at 546. In fact, the *Steele* Court concluded that a Florida trial court *cannot* use a special verdict form on which the jury specifies what aggravating circumstances – if any – it has agreed on, stating:

> Unless and until a majority of this Court concludes that *Ring* applies in Florida, *and* that it requires a jury's majority (or unanimous) conclusion that a particular aggravator applies, or until the Legislature amends the statute . , the trial court's order [requiring a special verdict form] imposes a substantive burden on the state

> not found in the statute and not constitutionally required.

Id. at 545-46.

According to the *Steele* Court, prohibiting a trial court from even asking the jury to specify the factors it found "fosters [the judge's] independence because the trial court has no jury findings on which to rely. Individual jury findings on aggravating factors would contradict this settled practice." *Id.* at 546; *see also* FSA 921.141(3) (trial court has independent statutory duty to impose a sentence of life imprisonment or death "notwithstanding the recommendation of a majority of the jury"); *Russ v. State*, 73 So. 3d 178, 198 (Fla. 2011) (court "required to make independent findings on aggravation, mitigation, and weight.").

The ABA urges that Florida's desire for judicial independence is contrary to this Court's holding in *Ring* that aggravating circumstances must be found by a jury, 536 U.S. at 609, and to its implication that clear jury findings are constitutionally required. *Compare id.* (*overruling Walton v. Arizona*, 497 U.S. 639 (1990), "to the extent [*Walton*] allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty."). And, the ABA urges, Florida's requirement that a judge independently weigh the aggravating and mitigating factors to arrive at its own conclusion as to the appropriate sentence is contrary to the Eighth Amendment's requirement of special procedural safeguards when a State seeks the death penalty. As Justice Breyer has concluded, "the Eighth Amendment requires that a jury, not a judge, make the decision to

sentence a defendant to death." *Ring*, 536 U.S. at 614 (Breyer, J., concurring).

Further, the ABA respectfully submits that Florida's system undermines a jury's ability to arrive at a considered recommendation as to the appropriate sentence when life or death is at issue. As research shows, when a capital jury makes a sentencing recommendation but knows that the final sentencing authority is left to the judge, capital jurors "do *not* feel responsible for the sentences that they recommend," and "penalty phase deliberations are often exceedingly brief with very little discussion of the evidence." Ross Kleinstuber, *"Only a Recommendation": How Delaware Capital Sentencing Law Subverts Meaningful Deliberations and Jurors' Feelings of Responsibility*, 19 Widener L. Rev. 321, 331 (2013) (emphasis in original).

The ABA urges that, when the members of a capital sentencing jury – and especially a jury under Florida's capital sentencing system – do not feel responsible for the sentences they recommend, they cannot fulfill their constitutional duty as the "link between contemporary community values and the penal system" that a jury is to forge each time it makes "a selection . between life imprisonment and death for a defendant convicted in a capital case[.]" *Gregg v. Georgia*, 428 U.S. 153, 181 (1976). As Justice Breyer stated in his *Ring* concurrence, "jurors possess an important comparative advantage over judges. In principle, they are more attuned to the community's moral sensibility" and they "reflect more accurately the composition and experiences of the community as a whole. Hence, they are more likely to express the conscience of the community on the ultimate question of life or death."

536 U.S. at 615 (Breyer, J., concurring in the judgment) (internal quotation marks and citations omitted).

In order to act as the "conscience of the community" when considering whether to recommend that a defendant receive the ultimate punishment of death, it is essential that members of the jury fully accept the responsibility entrusted to them. Acceptance of this responsibility is essential, the ABA submits, to ensure that any death sentence that results will not be imposed lightly, unfairly or arbitrarily, but instead, and beyond a reasonable doubt, will be legally, morally, and constitutionally warranted.

CONCLUSION

For all of the foregoing reasons, the ABA respectfully urges the judgment of the Florida Supreme Court be reversed.

Respectfully submitted,

Of Counsel:
RORY K. LITTLE
THOMAS J. TYNAN
SAURISH BHATTACHARJEE

WILLIAM C. HUBBARD
Counsel of Record
PRESIDENT
AMERICAN BAR ASSOCIATION
321 North Clark Street
Chicago, IL 60654
(312) 988-5000
abapresident@americanbar.org

Counsel for Amicus Curiae American Bar Association

APPENDIX

APPENDIX

TABLE OF CONTENTS

Resolution 108A and Report, American Bar Association (February 2015) ABA App. 1

APPENDIX

AMERICAN BAR ASSOCIATION

DEATH PENALTY DUE PROCESS REVIEW PROJECT

SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES

RESOLUTION AND REPORT TO THE HOUSE OF DELEGATES
(February 2015)

RESOLUTION #108A

RESOLVED, That the American Bar Association urges all federal, state, and territorial governments, that impose capital punishment, and the military, to require that:

(1) Before a court can impose a sentence of death, a jury must unanimously recommend or vote to impose that sentence; and

(2) The jury in such cases must also unanimously agree on the existence of any fact that is a prerequisite for eligibility for the death penalty and on the specific aggravating factors that have each been proven beyond a reasonable doubt.

REPORT

The vast majority of U.S. jurisdictions that have capital punishment require a jury's recommendation of a death sentence to be unanimous. However, there are a few

outliers that allow a person to be sentenced to death on the recommendation of a non-unanimous jury. This Recommendation urges the retention or adoption of the unanimous jury-based sentencing schemes maintained, and successfully utilized, by the vast majority of states, the military, and the Federal government. With a decision as serious and irreversible as imposing the death penalty – arguably the most significant determination we ask our citizens to make – the American Bar Association believes that the vote of the jury should be unanimous both in its fact-finding role on the aggravating circumstances that legally allow consideration of a death sentence and in the ultimate determination that permits a court to impose a sentence of death.

As this Report outlines, this Recommendation complements the ABA's other policies and principles reflecting its longstanding and strong support of jury verdict unanimity, particularly in criminal trials, and the ABA's extensive policies on the importance of ensuring that death penalty cases are administered fairly and impartially, in accordance with due process. This Recommendation, which speaks to the particular significance of the sentencing determination in a death penalty case, shall reflect the ABA's position that when imposition of the ultimate punishment is to be permitted, unanimity in the jury's decision is essential.

I. Background

The capital punishment laws currently used in the United States have been approved by the Supreme Court only since 1976, when the newly enacted death penalty statutes of Georgia, Florida, and Texas were upheld, effectively reinstating the constitutionality of

the modern death penalty in *Gregg v. Georgia* and its companion cases.[1] Although the three capital punishment statutes provided for differing sentencing structures, all permitted jury input with schemes that the Court found guaranteed the reliability required by the Eighth Amendment.[2]

However, of the 32 U.S. states that currently have the death penalty, only three do not now require that the jury that votes on the life or death sentence be unanimous in its final sentencing recommendation or decision; the federal government also requires unanimity.[3] Alabama permits a jury to recommend a death sentence on a vote of 10-2 and that vote is not binding on the trial court.[4] By judicial decision, Alabama ensures that every death sentence has been based on a unanimous finding of at least one aggravating circumstance.[5] But Alabama also permits the judge to make a decision to issue a death sentence, even after a unanimous jury makes a recommendation for a life sentence. Delaware requires that the jury

---

[1] *Gregg v. Georgia*, 428 U.S. 153 (1976) (joint opinion); *Proffitt v. Florida*, 428 U.S. 242 (1976) (joint opinion); *Jurek v. Texas*, 428 U.S. 262 (1976) (joint opinion).

[2] *Gregg*, 428 U.S. at 181; *Proffitt*, 428 U.S. at 252; *Jurek*, 428 U.S. at 276.

[3] Fed. R. Crim. P. 31 (a).

[4] Ala. Code § 13A-5-46-47 (2012).

[5] *See, e.g.*, *Ex parte McNabb*, 887 So. 2d 998, 1005-05 (Ala. 2004); *Ex parte Waldrop*, 859 So. 2d 1181, 1188 (Ala. 2002); *McCray v. State*, 88 So. 3d 1, 82 & n.33 (Ala. Crim. App. 2010).

unanimously find at least one aggravating circumstance beyond a reasonable doubt and that the jury note how each juror voted on the decision whether the aggravating circumstances outweigh the mitigating circumstances, but leaves the sentencing decision to the trial judge.[6] Finally, Florida requires neither a unanimous jury recommendation nor a unanimous finding by the jury that any aggravating circumstance has been proved.[7] A Florida jury can recommend a death sentence to the trial judge on a simple majority vote of the 12 jurors, and there is no special verdict required that would reflect the vote on the aggravating circumstances.[8]

In 2002 there was a sea change in terms of the legal significance of jury sentencing decisions in capital cases when, in *Ring v. Arizona*, the U.S. Supreme Court concluded that capital defendants "are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment."[9] While the issue of whether the Sixth Amendment required the jury to make the ultimate

---

[6] Del. Code Ann. Tit. 11, § 4209(c)(3)(A) (West 2013).

[7] Even in 1976, Florida's capital sentencing scheme was particularly unique in that the jury only recommended a sentence, its recommendation need not be unanimous or by any particular numerical vote, and the trial judge was permitted to override the jury's sentencing vote, whether it was for a life or a death sentence. *See Proffitt*, 428 U.S. at 252; *see also, Spaziano v. Florida*, 468 U.S. 447 (1984).

[8] Fla. Stat. §§921.141(2)-(3) (2014).

[9] 536 U.S. 584 at 589 (2002).

penalty determination was not before the Court,[10] the Court observed that "the great majority of States responded to the Court's Eighth Amendment decisions requiring the presence of aggravating circumstances in capital cases by entrusting those determinations to the jury."[11] The Court then held that because the enumerated aggravating circumstances "operate as the functional equivalent of an element of a greater offense, the Sixth Amendment requires that they be found by a jury."[12]

The *Ring* Court, quoting from *Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968), also generally extolled the virtue of trial by jury, explaining, "[t]he guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered."[13] In a concurring opinion, Justice Scalia bemoaned the "perilous decline" in the belief in the right to a jury trial, and noted:

> That decline is bound to be confirmed, and indeed accelerated, by the repeated spectacle of a man's going to his death because a *judge* found that an aggravating factor existed. We cannot preserve our veneration for the protection of the jury in criminal cases if we render ourselves callous to the need for that protection by

---

[10] *Id.* at 597 n.4

[11] *Id.* at 607-08 (footnote omitted).

[12] *Id.* at 609 (citation omitted).

[13] 536 U.S. at 609.

> regularly imposing the death penalty without it.[14]

Following *Ring*, the Supreme Court of Florida, in *State v. Steele*, addressed the lack of any jury-unanimity requirement in the Florida death penalty scheme and underscored the need for that state's legislature to change its statute:

> [W]e express our considered view, as the court of last resort charged with implementing Florida's capital sentencing scheme, that in light of developments in other states and at the federal level, the legislature should revisit the statute to require some unanimity in the jury's recommendations. Florida is now the only state in the country that allows a jury to decide that aggravators exist *and* to recommend a sentence of death by a mere majority vote.[15]

To date, however, Florida's legislature has not voted to change its statute that provides for a recommendation from a simple majority of capital sentencing jurors, and Delaware and Alabama also have not taken significant steps to reform their laws.

II. The Importance of Unanimity

Not only is the principle that juries should be unanimous steeped in the common law dating back to the 14th Century and in American jurisprudence as

---

[14] *Id.* at 612 (emphasis in original).

[15] 921 So. 2d 538 at 548 (Fla. 2005) (emphasis in original).

early as the 19th Century,[16] but more recent jury research over the past two decades has established that eliminating the unanimity requirement "can result in truncating or even eliminating jury deliberations."[17] Empirical studies have revealed that, without a unanimity requirement for a recommendation of death, capital jurors do not devote the same energy or emotional commitment to the discussion among jurors on the ultimate sentencing decision, and pro-death jurors are able to overpower and ultimately silence undecided or minority viewpoint jurors.[18] As Cantero & Kline aptly explain:

> [C]ourts that allow a non-unanimous jury to render a verdict invariably empower superficial, narrow, and prejudiced arguments that appeal only to certain groups. Unanimous verdicts ensure that defendants are convicted on the

---

[16] *See* Stephan Landsman, The Civil Jury in America: Scenes from an Unappreciated History, 44 HASTINGS L.J. 579, 586 (1993); *American Publishing Co. v. Fisher*, 166 U.S. 464 (1897).

[17] Kim Taylor-Thompson, *Empty Votes in Jury* Deliberations, 113 Harv. L. Rev. 1261, 1263 (2000).

[18] *See* William J. Bowers et al., *The Decision Makers: An Empirical Examination of the Way the Role of the Judges and Jury Influence Death penalty Decision-Making*, 63 Wash. & Lee L. Rev. (2006); Samuel Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. Personality & Soc. Psychol. 597 (2006); Dennis J. Devine et al., *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 Phsycol. Pub. Pol'y & L 622, 669 (2001)

> merits and not merely on the whims of a majority.[19]

Thus, the data suggest that any measure that encourages jurors to devote more time and thought to deliberations, and empowers minority jurors to voice their opinions and fully participate in the process, increases the reliability of jury determinations and is a constitutional imperative. It is crucial that jurors seriously discuss and consider all of the evidence, both with regard to aggravation and mitigation, before issuing a recommendation or decision supporting a death sentence.

Reaching a unanimous consensus is particularly critical when the jury is determining what aggravating circumstances, if any, have been proven. When the Supreme Court invalidated the death penalty in *Furman v. Georgia*, the central concern was that defendants were being condemned to death arbitrarily and capriciously.[20] In an oft quoted assessment, Justice White pointed out that the schemes under review provided "no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not."[21] To address the Furman Court's concerns that capital sentencers had unguided discretion, legislatures subsequently delineated aggravating circumstances

---

[19] Raoul G. Cantero & Robert M. Kline, *Death is Different: The Need for Jury Unanimity in Death Penalty Cases,* 22 St. Thomas Law Rev. 31-32 (2009) (Footnotes omitted).

[20] *See, e.g.*, 408 U.S. at 313 (White, J., concurring).

[21] *Id.*

that – whether or not one or more of them were prerequisites to consideration of capital punishment – were justified as channeling the jury's discretion and narrowing the scope of homicides for which the death penalty may be imposed in order to establish less arbitrary – and constitutional – death penalty statutes.[22] They clearly are, as the Supreme Court has said, the functional equivalent of elements of the offense when their existence is a prerequisite to imposing the death penalty.[23] But aggravating circumstances also play a special role that can lead to a death rather than life outcome when they are otherwise considered as part of a sentencing determination.

Because the ABA has long sought to ensure that "death penalty cases are administered fairly and impartially,"[24] it is manifest that the jury's determination that any aggravating circumstance has been established should be by a unanimous vote, upon proof beyond a reasonable doubt. Indeed, capital juries are often asked to weigh evidence of one or multiple statutorily-specified aggravating factors against mitigation evidence, or are allowed to consider additional or "catch-all" evidence as aggravating that was not proven as an element of the crime but may otherwise justify the death penalty. Therefore, under

---

[22] *See, e.g., Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) (plurality opinion); *Gregg v. Georgia*, 428 U.S. at 196-97; *Profitt v. Florida*, 428 U.S. at 258.

[23] *Ring*, 536 U.S. at 609 (citation omitted).

[24] ABA Resolution 107 (Feb. 1997).

most death penalty schemes, evidence of specific aggravators clearly plays a special role in determining whether or not the death penalty is ultimately appropriate.

Plus, this is a complicated and unique analysis being requested of a capital sentencing jury – or any jury, for that matter. Requiring unanimity on this most crucial determination, as discussed above, promotes a thorough and reasoned resolution.[25] And the reasonable doubt standard is the "prime instrument for reducing the risk of [sentences] resting on factual error."[26] When aggravating circumstances must be unanimously found beyond a reasonable doubt a community's confidence that its capital scheme is designed to defeat arbitrary and capricious infliction of the death sentence is likely enhanced, as is the integrity of the entire process.

Additionally, to the extent that lack of unanimity on the finding of an aggravating circumstance or on the final sentencing verdict reflects jurors' lack of complete confidence in the evidence presented to them, the constantly growing number of exonerations of death-sentenced individuals nationwide supports the value of jury unanimity. Indeed, there are now 147 individuals

---

[25] Capital jury researchers have found that jurors are often confused about how to conduct the statutorily required weighing of aggravation and mitigation evidence. *See e.g.* William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 Ind. L. J. 1043 (1995). Thus, requiring jurors to methodically determine unanimity on each aggravating factor presented may help prevent truncation of this process.

[26] *In re Winship*, 397 U.S. 358, 363 (1970).

exonerated from death row nationwide, and 25 of those, more than any other state, come from Florida, where there is no unanimity requirement on the aggravating-circumstance findings and a simple majority of jurors can authorize a death sentence.[27]

III. Existing ABA Policies Support Unanimous Verdicts

In recognition of these principles of American justice and the empirical evidence discussed above, the ABA has enacted several policies related to the importance of unanimity in jury *verdicts,* but not yet on jury death penalty sentencing determinations. In 1974, the ABA first took a firm stance on the necessity of unanimity in federal criminal cases. The resolution states that the ABA is "opposed to the concept of less than unanimous verdicts in Federal criminal cases." In the accompanying policy report, the Committee detailed the rationale for its position, stating that "God's most precious gifts of life/liberty are involved in Federal criminal cases" and as such, "our time-honored procedures for depriving a person of these precious gifts only by a unanimous verdict by a jury of his peers should be retained."[28]

Subsequently, the Commission on Standards of Judicial Administration published *Standards Relating to Trial Courts*, calling for all criminal case jury verdicts to be unanimous, not just federal cases. The

---

[27] Death Penalty Information Center, http://www.deathpenaltyinfo.org/innocence-and-death-penalty#inn-st (last visited Nov. 14, 2014).

[28] *See* ABA Resolution 134 (Aug. 1974).

ABA also has promulgated its extensive and widely-cited *Criminal Justice Standards* and *Jury Principles* that both reflect the ABA's strong position favoring unanimous jury verdicts in all criminal cases.[29] Specifically, Standard 15-1.1 (c) calls for a unanimous jury verdict in all cases "in which confinement in jail or prison may be imposed," and Jury Principle 4 (b), promulgated in 2005, uses similar language, saying "a unanimous decision should be required in all criminal cases heard by a jury."

The accompanying commentary for Jury Principle 4 cites both historical and empirical reasons that jury unanimity is vitally important, including findings like the research cited above and other evidence. In criminal trials, there is a heightened need for accuracy when "a person's liberty is at risk and society faces the threat of mistaken acquittal or conviction."[30] Several studies have shown that unanimous verdicts provide this accuracy through increased minority juror participation. As the accompanying commentary notes, unanimous verdicts require "each point of view to be considered and all jurors persuaded." Wide ranging discussions with all jurors participating are "likely to be more accurate" than the non-unanimous alternative. Moreover, a non-unanimous verdict "fosters a public perception of unfairness and undermines acceptance of verdicts and the legitimacy of the jury system."[31] In the

---

[29] *ABA Standards for Criminal Justice (1978); ABA Principles for Juries and Jury Trials (2005).*

[30] *ABA Principles for Juries and Jury Trials* at 25 *(2005).*

[31] *Id.* at 24-25 (internal citations omitted).

death-penalty realm, this perception is exacerbated by the statistical evidence that, after controlling for variables, black defendants who kill white victims have a significantly greater chance of being sentenced to death.[32]

Additionally, the ABA's Death Penalty Due Process Review Project, in conjunction with independent state-based experts, has coordinated comprehensive studies and analyses of the administration of capital punishment in twelve U.S. states.[33] The assessments were designed to give jurisdictions an objective instrument to evaluate their administration of the death penalty, by comparing the actual practices in the state with a series of recommendations based on the original 2001 *ABA Protocols on the Administration of Capital Punishment* and the revised version in 2010. The Project completed assessments of both Florida and Alabama in 2006, and in both reports the Assessment Teams, made up of law and psychology professors, former judges, prosecutors, and defense lawyers, specifically recommended changing the states' laws allowing for non-unanimous jury recommendations that death be imposed.[34]

---

[32] David C. Baldus et al., *Equal Justice and the Death Penalty,* 150 (1990).

[33] ABA Death Penalty Due Process Review Project, http://www.americanbar.org/groups/individual_rights/projects/death_penalty_due_process_review_project/death_penalty_assessments.html (Last visited Nov. 14, 2014).

[34] *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Florida Death Penalty Assessment Report,* pg. x, September 2006 ("The State of Florida should require that the

Finally, the ABA has sought meaningful application of its overarching position favoring jury verdict unanimity, submitting an *amicus curiae* brief in *Lee v. Louisiana* before the Supreme Court of the United States in 2008. The ABA asked the Court to grant certiorari in *Lee* to consider whether the Sixth Amendment right to jury trial, as applied to the States through the Fourteenth Amendment, should allow a criminal conviction based on a non-unanimous jury verdict. The brief noted that the "ABA's long-standing position on jury unanimity in criminal trials is the result of its continuing and comprehensive study of the jury's role in the criminal justice system" and extensively cited the aforementioned policies calling for unanimous jury verdicts set forth in the *ABA Criminal Justice Standards on Trial by Jury* and the *ABA Jury Principles*.

IV. Conclusion

In short, the ABA believes in the vital and time-honored role of the American jury as fact-finder, expressing the "conscience of the community."[35] For the reasons stated in this Report and in the other ABA policies surrounding the importance of verdict unanimity and the reasonable doubt standard, all

---

jury's sentencing verdict in capital cases be unanimous and, when the sentencing verdict is a death sentence, that the jury reach unanimous agreement on at least one aggravating circumstance."); *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Alabama Death Penalty Assessment Report*, pg. vi, June 2006 ("The State of Alabama should require that the jury be unanimous before it may recommend a sentence of death.").

[35] *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968).

capital jurisdictions should require their sentencing juries to determine unanimously and beyond a reasonable doubt the existence of any aggravating circumstance, and, ultimately, to reach a unanimous determination that a death sentence is legally warranted in a particular case. This deliberative function is crucial in order to ensure that the death sentence is not being unfairly or arbitrarily imposed. The decisions from the United States Supreme Court on the size and vote requirements for petit juries generally,[36] coupled with the empirical data about jury behavior and the capital jurisprudence that underscores that "death is different," reinforce the significance of and need for juror unanimity in the determination whether a man or woman lives or dies.[37]

Respectfully submitted,

Virginia E. Sloan, Chair
Death Penalty Due Process Review Project
February 2015

Mark I. Schickman, Chair
Section of Individual Rights and Responsibilities
February 2015

---

[36] *See Burch v. Louisiana*, 441 U.S. 130 (1979).

[37] Cantero & Kline, *supra*, at 17-25.

Supreme Court, U.S.
FILED
JUN - 4 2015
OFFICE OF THE CLERK

No. 14-7505

IN THE

Supreme Court of the United States

TIMOTHY LEE HURST,

Petitioner,

—v.—

STATE OF FLORIDA,

Respondent.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, THE ACLU OF FLORIDA, AND THE CONSTITUTIONAL ACCOUNTABILITY CENTER, IN SUPPORT OF PETITIONER

Elizabeth B. Wydra
Brianne J. Gorod
CONSTITUTIONAL
ACCOUNTABILITY CENTER
1200 18th St., N.W., Suite 501
Washington, D.C. 20036

Clifford M. Sloan
Paul M. Kerlin
Marisa B. Van Saanen
James C. Altman
SKADDEN, ARPS, SLATE
MEAGHER & FLOM LLP
1440 New York Ave., N.W.
Washington, D.C. 20005

Counsel for the Constitutional Accountability Center

Brian W. Stull
Counsel of Record
Cassandra Stubbs
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
201 W. Main Street, Suite 402
Durham, NC 27707
(919) 682-9469
bstull@aclu.org

Steven R. Shapiro
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
125 Broad Street
New York, NY 10004

Nancy G. Abudu
AMERICAN CIVIL LIBERTIES
UNION OF FLORIDA
4500 Biscayne Blvd., Suite 340
Miami, FL 33137

Library of Congress
Law Library

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. THE RIGHT TO A UNANIMOUS JURY VERDICT IN CRIMINAL CASES WAS WELL-ESTABLISHED WHEN THE SIXTH AMENDMENT WAS ADOPTED AND WIDELY UNDERSTOOD TO BE PART OF ITS JURY TRIAL GUARANTEE. 5

A. Unanimity Was Part Of The English Common-Law Jury Right. 7

B. The Founders Claimed For This Nation The English Common-Law Jury Right, Which Included Unanimity. 9

C. Madison's Original Draft Of The Sixth Amendment Required Jury Unanimity, And Its Subsequent Omission From The Text Did Not Reflect Any Substantive Disagreement With The Requirement. 10

D. The Contemporaneous Teachings Of Justice Wilson Reinforce The View That Unanimity Was Part Of The Jury Right. 13

E. Early Practices, Rulings, And Scholars Confirmed The Universal Understanding That Unanimity Was Inherent In The Jury Right. 17

F. This Court's Precedents Confirm Unanimity's Integral Role. 24

G. *Apodaca v. Oregon* Does Not Determine The Result In This Case. 25

II. FLORIDA'S DISREGARD OF THE JURY'S HISTORIC ROLE IN CAPITAL SENTENCING ALSO VIOLATES THE EIGHTH AMENDMENT 29

A. The Jurors Of Common-Law England Decided The Facts That Determined If A Case Was Capital 29

B. American Juries At The Time Of Our Founding Carried On With The Pivotal Role In The Execution Decision. 33

CONCLUSION 37

TABLE OF AUTHORITIES

CASES

Allen v. United States, 164 U.S. 492 (1896) 25

Am. Pub. Co. v. Fisher, 166 U.S. 464 (1897) 24

Andres v. United States, 333 U.S. 740 (1948) 20

Apodaca v. Oregon, 406 U.S. 404 (1972) .....*passim*

Apprendi v. New Jersey, 530 U.S. 466 (2000) 3, 28, 30

Atkins v. State, 16 Ark. 568 (1855) 20

Beck v. Alabama, 447 U.S. 625 (1980) 27, 29, 36

Blakely v. Washington, 542 U.S. 296 (2004) 28

Commonwealth v. Cawood, 4 Va. 527 (Va. Gen. Ct. 1826) 19

Commonwealth v. Cook, 6 Serg. & Rawle 577 (Pa. 1822) 20

Commonwealth v. Roby, 29 Mass. 496 (1832) 20

Duncan v. Louisiana, 391 U.S. 145 (1968) 6, 9, 25

Furman v. Georgia, 408 U.S. 238 (1972) 35

Hall v. Florida, __ U.S. __, 134 S. Ct. 1986 (2014) 29, 36

Inhabitants of Mendon v. Worcester Cnty., 27 Mass. 235 (1830) 19

Johnson v. Louisiana, 406 U.S. 366 (1972) 24, 26, 27

Jones v. United States, 526 U.S. 227 (1999) 30

Kennedy v. Louisiana, 554 U.S. 407 (2008) 32, 36

McDonald v. City of Chicago, Ill., 561 U.S. 742 (2010) 26

McGautha v. California, 402 U.S. 183 (1971), *overruled on other grounds by Furman v. Georgia*, 408 U.S. 238 (1972) 31, 33, 35

Monroe v. State, 5 Ga. 85 (1848) 20

Ned v. State, 7 Port. 187 (Ala. 1838) 20

Nomaque v. People, 1 Ill. 145 (1825) 20

Opinion of Justices, 41 N.H. 550 (1860) 17, 18

Respublica v. Oswald, 1 Dall. 319 (Pa. 1788) 13

Ring v. Arizona, 536 U.S. 584 (2002) .....*passim*

Root v. Sherwood, 6 Johns. 68 (N.Y. Sup. Ct. 1810) 19

Rouse v. State, 4 Ga. 136 (1848) 18

S. Union Co. v. United States, __ U.S. __, 132 S. Ct. 2344 (2012) 28

Spaziano v. Florida, 468 U.S. 447 (1984) 29

State v. Baldwin, 5 S.C.L. 309 (S.C. Const. App. 1813) 19

State v. Christmas, 20 N.C. 545 (1839) 19

State v. Garrigues, 2 N.C. 241 (Super. L. & Eq. 1795) 20

State v. Hall, 9 N.J.L. 256 (N.J. Sup. Ct. 1827) 19

State v. McLemore, 20 S.C.L. 680 (S.C. L. & Eq. 1835) 20

State v. Porter, 4 Del. 556 (1 Harr. 1844) 19

Swain v. Alabama, 380 U.S. 202 (1965, *overruled on other grounds by Batson v. Kentucky*, 476 U.S. 79 (1986) 25

Thompson v. Utah, 170 U.S. 343 (1898), *overruled on other grounds by Collins v. Youngblood*, 497 U.S. 37 (1990) 6, 24

United States v. Lawrence, 26 F. Cas. 886 (C.C.D.D.C. 1835) 19

United States v. Perez, 22 U.S. 579 (1824) 19, 20

Walton v. Arizona, 497 U.S. 639 (1990), *overruled by Ring v. Arizona*, 536 U.S. 584 (2002) 30

Williams v. Florida, 399 U.S. 78 (1970) 11

Winston v. United States, 172 U.S. 303 (1899) 34

Witherspoon v. Illinois, 391 U.S. 510 (1968) 29

Woodson v. North Carolina, 428 U.S. 280 (1976) 7, 33, 34, 35

Work v. State, 2 Ohio St. 296 (1853) 18, 19

STATUTES

U.S. Const. amend. VI ..... *passim*

U.S. Const. amend. IIX 1, 5, 28, 29

U.S. Const. amend. XIV 23, 26

U.S. Const. art. III, § 2 ..... 12, 24

Fla. Stat. § 775.082 (3)(a) 2

Fla. Stat. § 921.141 (3)(a) 2

Fla. Stat. § 921.141 (3)(b) 2

Fla. Stat. § 921.141 (3)(c) 2

Ga. Const. of 1798, § 6 17

NH Const. of 1783 17

Oh. Const. of 1851, art. 1, § 1.05 17

Pa. Const. art. IX, § VI 14

Pa. Const. of 1776, Art. IX 13

OTHER AUTHORITIES

Andrew Horne, *The Mirror of Justices* (William Joseph Whittaker, ed., 1895) 6

Charles W. Ehrhardt et al., *The Aftermath of Furman: The Florida Experience*, 64 J. Crim. L. & Criminology 2 (1973) 35

Collected Works of James Wilson (K. Hall & M. Hall eds., 2007) ..... *passim*

Foreign Spectator, *Remarks on the Amendments to the Federal Constitution, Proposed by the Conventions . by a Foreign Spectator*, THE FED. GAZ. & PHILADELPHIA EVENING POST, Dec. 2, 1788 ..... 12, 13

Gentlemen of the Grand Jury: The Surviving Grand Jury Charges from Colonial, State, and Lower Federal Courts before 1801 (Stanton D. Krauss ed., 2012) ..... *passim*

Jeffrey Abramson, *We, The Jury: The Jury System and the Ideal of Democracy* (BasicBooks 1994) 7, 8, 30, 35

Joel Prentiss Bishop, *Criminal Procedure; or, Commentaries on the Law of Pleading and Evidence and The Practice in Criminal Cases* (1880) 23

John Guinther, *The Jury in America* (1988) 7, 8

John Norton Pomeroy, *An Introduction to Municipal Law* (1864) 23

Journals of Continental Congress, 1774-1789 (Worthington Chauncey Ford ed., Government Printing Office 1904) 9

Joseph Story, *Commentaries on the Constitution of the United States* (Melville M. Bigelow ed., William S. Hein & Co., Inc., ed., 1994) (1891) 6, 23

Leonard W. Levy, *Seasoned Judgments: The American Constitution, Rights, and History* (1995) 14

Nathan Dane, *General Abridgement and Digest of American Law* (Boston: Cummings, Hilliard & Co. eds., 1823) 22

Neil Cogan, *The Complete Bill of Rights* (1997) 10, 11, 12, 19

St. George Tucker, *Blackstone's Commentaries App.* (Birch & Small eds., 1803) 22

The Documentary History of the Supreme Court of the United States, 1789-1800 (Maeva Marcus ed., 1992) 22

The Trial of William Wemms, James Hartegan, William M'Cauley, Hugh White, Matthew, Killroy, William Warren, John Carrol, and High Montgomery, Soldiers in his Majesty's 29th Regiment of Foot, for the Murder of Crispus Attucks, Samuel Gray, Samuel Maverick, James Caldwell, and Patrick Carr, on Monday-Evening 207 (Boston: J. Fleeming 1770) 10

Thomas Andrew Green, *Verdict According to Conscience: Perspectives on the English Criminal Trial Jury 1200-1800* (1985) ..... *passim*

Thomas Andrew Green, *The Jury and the English Law of Homicide, 1200-1600*, 74 Mich. L. Rev. 413 (1976) 30, 31

Thomas Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* (1868) 23

W. Blackstone, Commentaries on the Laws of England (1769) ..... *passim*

INTEREST OF *AMICI*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution. The ACLU of Florida is one of its statewide affiliates. *Amici* respectfully submit this brief to assist the Court in resolving whether Florida's capital sentencing procedures violate the Sixth and Eighth Amendments to the Constitution. The questions before the Court are of substantial importance to the ACLU and its members.

The Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars and the public to improve understanding of the Constitution and to preserve the rights, freedoms, and structural safeguards that our charter guarantees. CAC accordingly has a strong interest in this case and in the scope of the protections provided by the Sixth and Eighth Amendments.

---

[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court. No party has authored this brief in whole or in part, and no one has made a monetary contribution to the preparation or submission of this brief other than *amici*, its members, and its counsel.

STATEMENT OF THE CASE

Before any person convicted of first-degree murder may be sentenced to death by a Florida court, the trial judge – but not a unanimous jury – must find "sufficient aggravating factors" from a statutorily-enumerated list; and must find that "there are insufficient mitigating circumstances to outweigh the aggravating circumstances." *See* Fla. Stat. §§ 921.141 (3)(a),(b), 775.082 (3)(a). In a non-binding majority vote, the jury advises on these questions, as well as the ultimate question: "whether the defendant should be sentenced to life imprisonment or death." § 921.141 (2)(a),(b),(c). As petitioner has explained, however, it is the judge who finds the facts necessary for a death sentence, and then decides whether to impose that sentence.

Following this statutory procedure, the jury in petitioner's case recommended the death penalty by a 7-5 vote. The jury had been presented with two possible aggravating factors. But it is impossible to know whether a majority voted in favor of either since Florida law allows a death sentence where four jurors believe one aggravator applies and three others believe a second aggravator applies, and the jurors did not identify those they found. As Florida law requires, the trial judge then sentenced petitioner to death based on his own independent finding that aggravating factors existed in this case to justify the death penalty, and that death was an appropriate sentence because the aggravating factors outweighed the mitigating factors. On appeal, petitioner's death sentence was upheld based solely on the trial judge's factual findings and without regard to the jury's recommendation.

SUMMARY OF ARGUMENT

Petitioner persuasively demonstrates that the Florida capital-sentencing scheme suffers from multiple constitutional defects that render it invalid under *Ring v. Arizona*, 536 U.S. 584, 609 (2002). First, the jury is deprived of its constitutionally-required role of finding aggravators; second, there is no requirement that even a majority of jurors agree on a single aggravator, and indeed the jurors may not have done so in this case; and third, the jury can recommend death by a simple majority vote, which is what occurred here. This brief focuses only on the last issue and, more specifically, on the historical support for the claim that a jury's findings of aggravating circumstances must be unanimous and certainly may not be made by a bare majority.

In *Ring*, this Court held that Arizona's capital sentencing scheme violated the Sixth Amendment because it allowed a judge, "sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty." *Id.* at 609 (citation omitted). Building on its earlier decision in *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000), the Court ruled that a capital defendant has a Sixth Amendment right to a jury finding on factual issues that are either an element of the crime or determine eligibility for execution.

While the question whether the jury must be unanimous in such findings was not before the Court in *Ring*, Justice Scalia's concurring opinion assumed that unanimity would be required, 536 U.S. at 610 (Scalia, J., concurring). The history of the Sixth Amendment fully supports Justice Scalia's understanding. The right to a unanimous jury in

criminal cases had been an established part of English common law for centuries before the Sixth Amendment was ratified. The fact that the Sixth Amendment does not explicitly impose a unanimity requirement only shows that the drafters deemed it redundant. By the late eighteenth century, the right to be tried by a jury of one's peers had long incorporated the principle that a criminal conviction must rest on a unanimous jury verdict. The constitutional framers, as well as founding-era legislators, judges, and commentators were united in their view that the Sixth Amendment jury right encompassed the age-old common law right to unanimity.

Four members of this Court reached a different conclusion in *Apodaca v. Oregon*, 406 U.S. 404 (1972), but that conclusion is not controlling here for several reasons: (a) Justice Powell's critical fifth vote in *Apodaca* rested on the very different proposition that the unanimity required for federal juries by the Sixth Amendment did not apply to the states, adopting a view on incorporation the Court has discredited in later decisions; (b) *Apodaca* did not involve a capital case; (c) it involved a 10-2 or 11-1 vote, not the 7-5 vote at issue here; and (d) as shown below, the conclusions of the four justices about the history of the Sixth Amendment and the Framer's understanding of the jury right were incorrect.

At a bare minimum, history makes clear that the power to impose the death penalty, and to find the predicate facts for execution, was the sole province of unanimous juries. This history further supports petitioner's argument, which *amici* endorse but do not repeat, that Florida's capital sentencing

scheme violates the Eighth Amendment. Pet. Br. at 35, 47-49 (discussing failure of Florida's scheme to fulfill a retributive purpose, achieve reliable death verdicts, and comport with the evolving standards of decency).

Because the jury in this case did not cast *any* binding vote on petitioner's death sentence, that sentence cannot stand even if the jury's vote had been unanimous. But the ultimate sentence of death requires more than a simple majority vote under any circumstances. This Court has never upheld a 7-5 verdict even for far less serious crimes – and, indeed, strongly suggested in *Apodaca* that such verdicts would be unconstitutional. *A fortiori*, more is required when the state seeks to impose the uniquely-harsh and irrevocable punishment of death.

ARGUMENT

I. THE RIGHT TO A UNANIMOUS JURY VERDICT IN CRIMINAL CASES WAS WELL-ESTABLISHED WHEN THE SIXTH AMENDMENT WAS ADOPTED AND WIDELY UNDERSTOOD TO BE PART OF ITS JURY TRIAL GUARANTEE.

Long before the Sixth Amendment was drafted and ratified, the English common-law had incorporated the requirement of jury unanimity in criminal cases. *See, e.g.*, 4 W. Blackstone, Commentaries on the Laws of England 343 (1769) (hereafter Blackstone Commentaries). When American Justice James Wilson gave a founding-era lecture on the right to a jury trial, he told the following story in tracing the requirement of unanimity to the Middle Ages:

> "[The King] hanged [Judge] Cadwine, because he judged Hackwy to death without the assent of all the jurors in a case where he [Hackwy] had put himself upon a jury of twelve men; and because *three were for saving him against nine*, Cadwine removed the three for others upon whom Hackwy did not put himself."[2]

Those who came to this country from England regarded the right to a jury trial as part of "their birthright and inheritance." *Duncan v. Louisiana*, 391 U.S. 145, 154 n.21 (1968) (quoting *Thompson v. Utah*, 170 U.S. 343, 350 (1898) (quoting 2 Joseph Story, *Commentaries on the Constitution of the United States* 559 (Melville M. Bigelow ed., William S. Hein & Co., Inc., ed., 1994) (1891) (hereafter Story *Commentaries*))). Furthermore, they understood that inheritance to embrace what it had embraced in England. Not surprisingly, therefore, the importance of unanimity is a consistent theme in English common law, discussions of the jury right during the founding era, early interpretations of the right in state and federal courts, including this Court, and the understanding of commentators interpreting the

---

[2] *See* Lectures of Justice James Wilson (1791) in 2 *Collected Works of James Wilson* 970 (K. Hall & M. Hall eds., 2007) (hereafter *Wilson*) (quoting Andrew Horne, *The Mirror of Justices* (William Joseph Whittaker, ed. 1895) (emphasis added)). The internal cite is to a currently available edition of this book, as Justice Wilson provided no year of publication in his citation.

jury right and/or the Sixth Amendment throughout the antebellum era.

A. Unanimity Was Part Of The English Common-Law Jury Right.

By the founding of our Nation, unanimity had been integral to the English jury right for centuries. *See, e.g.*, 4 Blackstone Commentaries 343; Thomas Andrew Green, *Verdict According to Conscience: Perspectives on the English Criminal Trial Jury 1200-1800* 18 (1985); Jeffrey Abramson, *We, The Jury: The Jury System and the Ideal of Democracy* 72 (BasicBooks 1994); John Guinther, *The Jury in America* 12 (1988) (reviewing English foundation).

Blackstone is perhaps the most famous among many to describe the English jury right as including unanimity. He explained that "the founders of English law have with excellent forecast contrived" that no man should be convicted except upon an indictment "confirmed by the unanimous suffrage of twelve of his equals and neighbors, indifferently chosen, and superior to all suspicion." 4 Blackstone Commentaries 343. The protection of unanimous juries had life and death consequences in founding-era England, where "more than 200 offenses [were] then punishable by death[.]" *Woodson v. North Carolina*, 428 U.S. 280, 289 (1976) (plurality opinion).

As the Court recognized in *Apodaca*, "the requirement of unanimity arose in the Middle Ages[.]" 406 U.S. at 407. Historians record the first "instance of a unanimous verdict in 1367, when an English Court refused to accept an 11-1 guilty vote after the lone holdout stated he would rather die

in prison than consent to convict." Abramson, *supra*, at 179.

In 1670, the Crown tried William Penn in the Old Bailey on charges of speaking and preaching on a street and thereby causing "a great concourse and tumult of people in the street [who] a long time did remain and continue, in contempt of . the King, and of his law, to great disturbance of his peace."[3] After one and a half hours, the twelve jurors deadlocked. Abramson, *supra*, at 71. Eight voted for conviction, but four would agree to nothing more than that Penn had "preached to an assembly of persons[.]" Green, *supra*, at 224.

The bench "berated the four and sent the jury away to reconsider its decision." *Id.* at 224-25. The formerly divided jury next united around a "verdict" that Penn merely spoke on the street, which the court rejected. *Id.* at 225. The jury ultimately reached a unanimous verdict of not guilty. *Id.*[4] The course of history for this early colonial leader thus may well have turned on the English protection of a unanimous jury verdict.

Unanimity was part of the proud English jury tradition our founders brought to this land.

---

[3] Green, supra, at 222-25; *see also* Abramson, *supra*, at 72; Guinther, *supra*, at 24-25.

[4] A perhaps better known part of the story is that the Crown fined the dissenting jurors, including Edward Bushel, for their verdict. Abramson, *supra*, at 72. The jurors refused to pay, were imprisoned, and later successfully petitioned for their release, creating the precedent that jurors may never be fined or imprisoned for their verdicts. *Id.*

B. The Founders Claimed For This Nation The English Common-Law Jury Right, Which Included Unanimity.

This English history retained importance here because the jury trial right our Founders claimed was one and the same with the English common-law right. The impetus of our Founders' concern was the Crown's increasing violations of the colonists' common-law jury right. *See Duncan*, 391 U.S. at 151-52 (recounting this history). The drafters of the Declaration of Independence listed this complaint amongst their grievances. *Id.*

Our Founders specifically "claim[ed] all the benefits secured to the subject by the English constitution, and particularly that inestimable one of trial by jury." Continental Congress Resolution 5, in 1 *J. of Continental Congress*, 1774-1789, 69 (1904). The right the founders claimed was not some lesser, watered-down version of the common-law right. In particular, the Founders made clear in their writings that integral to the "great right [of] trial by jury" was unanimity. In a letter to inhabitants of Quebec, listing the "rights . we are, with one mind, resolved never to resign but with our lives," the Continental Congress described the jury right as follows: "This provides that neither life, liberty, nor property, may be taken from its possessor, until twelve of his unexceptionable countryman and peers shall pass their sentence upon oath against him . "[5]

---

[5] *See* Continental Congress, Letter to the Inhabitants of Quebec, in 1 *Journals of Continental Congress*, 1774-1789, 105, 106, 107 (Worthington Chauncey Ford ed., 1904).

Even the British soldiers accused of the Boston Massacre received the benefit of a unanimous jury – they were acquitted.[6] Early published grand jury addresses provide further evidence that those indicted on criminal charges were guaranteed the right to a unanimous jury. *See generally Gentlemen of the Grand Jury: The Surviving Grand Jury Charges from Colonial, State, and Lower Federal Courts before 1801*, vol. 1-2 109 (Stanton D. Krauss ed. 2012). *Id.* at 317 (MA, 1765, charge of Thomas Hutchinson), 665 (NY, 1768, Robert Livingston), 1108 (SC, 1703, Nicholas Trott), 1181 (SC, 1774, William Henry Drayton), 1204 (same in 1776).

C. Madison's Original Draft Of The Sixth Amendment Required Jury Unanimity, And Its Subsequent Omission From The Text Did Not Reflect Any Substantive Disagreement With The Requirement.

In the original draft of the Sixth Amendment James Madison submitted to Congress, he proposed a right to an "impartial jury of freeholders of the vincinage, with the *requisite of unanimity of conviction*, of the right of challenge, and other accustomed requisites." Cong. Reg. June 8, 1789, vol.

---

[6] *The Trial of William Wemms, James Hartegan, William M'Cauley, Hugh White, Matthew, Killroy, William Warren, John Carrol, and High Montgomery, Soldiers in his Majesty's 29th Regiment of Foot, for the Murder of Crispus Attucks, Samuel Gray, Samuel Maverick, James Caldwell, and Patrick Carr, on Monday-Evening* 207 (Boston: J. Fleeming 1770) (contemporaneous record of the trial of the soldiers accused in the Boston Massacre).

1, pp. 427-29 (emphasis added), in Neil Cogan, *The Complete Bill of Rights* 385 (1997).

The Senate substantially altered Madison's proposal, and sent it to a conference committee, which in turn drafted the familiar text that became the Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law

U.S. Const. amend VI (emphasis added). *See Apodaca*, 406 at 407-10 (recounting this history and similar discussion of it in *Williams v. Florida*, 399 U.S. 78, 95 (1970)).

At the time Congress was debating the proposed Bill of Rights, Madison wrote contemporaneous letters about the Senate's rejection of the language he proposed concerning the jury right. *Apodaca*, 406 U.S. at 409 (citing one of Madison's letters). Two letters to Edmund Pendleton, a Virginia representative to the Continental Congress, are particularly noteworthy.

On September 14, 1789, Madison wrote Pendleton that the Senate had "sent back the plan of amendments with some alterations which strike in my opinion at the most salutary articles." Neil Cogan, *supra*, at 480 (1997). The alterations he went on to discuss related to the vicinage (vicinity) requirement in his original text, opposed because states drew their pools from disparate geographical

subdivisions. *Id.* Madison did not mention any opposition to the unanimity requirement in his original proposal.

His second letter to Pendleton on September 23, 1789, two days before Congress approved the Bill of Rights, also focused on the Senate's "inflexib[ility] in opposing a definition of the locality of Juries." *Id.* at 480-81. Again, Madison made no mention of any known Congressional objection to the unanimity requirement. *Id. See also Apodaca,* 406 U.S. at 409 (noting the "considerable opposition in the Senate, particularly with regard to the vicinage requirement").

The reason Madison's letters to Pendleton *did not* complain about the elimination of his unanimity language from his proposal was that he and others believed that unanimity was an inherent part of the jury right set forth in the final text of the Sixth Amendment. This included Justice Wilson, a Founder who held strong views on the importance of unanimity and would have noticed had it been stripped from the Constitution. *See* § I (D), *infra.*

The ratification debate surrounding the original Constitution reflects a similar understanding. When North Carolina, Pennsylvania, Rhode Island, and Virginia separately suggested (among other alterations) that Art. III, § 2 be amended to make clear that the criminally accused has a right to a jury "without whose unanimous consent he cannot be found guilty," Cogan, *supra,* at 401-02, The Foreign Spectator, whose commentaries on the Constitution and amendment processes were widely read, described the amendments as unnecessary because all "these particulars are

included in the *usual trial by jury*."[7] (emphasis added).

A year before Madison submitted his proposed language, Chief Justice M'Kean of the Pennsylvania Supreme Court made a similar comment in an opinion about the provision in Pennsylvania's original Declaration of Rights expressly requiring unanimity.[8] *Respublica v. Oswald*, 1 Dall. 319, 323 (Pa. 1788). He wrote, "I have always understood it to be the law, independent of this section, that the twelve jurors must be unanimous in their verdict, and yet this section makes this express provision." *Id.*

By contrast, the concept of a bare majority verdict for criminal conviction would have been regarded by those who ratified the Constitution as inconsistent with both tradition and practice.

D. The Contemporaneous Teachings Of Justice Wilson Reinforce The View That Unanimity Was Part Of The Jury Right.

Lecturing on the Constitution as the Bill of Rights was still being ratified, Justice Wilson spoke long on the role of juries.[9] Wilson, *supra*, at 954-

---

[7] Foreign Spectator, *Remarks on the Amendments to the Federal Constitution, Proposed by the Conventions . by a Foreign Spectator*, THE FED. GAZ. & PHILADELPHIA EVENING POST, Dec. 2, 1788, at 2 (emphasis added).

[8] *See* Pa. Const. of 1776, Art. IX.

[9] Before President Washington appointed him to this Court, Justice Wilson helped to shape both the Declaration of Independence and the original Constitution. He was one of few to sign both documents. *See* 1 Wilson, *supra*, xi. He is widely

1011. He repeatedly stated that unanimity was of "indispensable" significance in criminal cases. *Id.* at 962-78, 984-989, 991-92, 1010-11. Surely Justice Wilson would have noticed and commented had he understood that Congress intended the (still recent) omission of unanimity from the Sixth Amendment's final text as a substantive change.[10] But he did not. Quite the opposite, he extolled unanimity's ongoing significance.

Justice Wilson described unanimity as an answer to society's dilemma of how to determine whether one of its members has committed a crime. He recognized that society as a *whole* cannot make that determination. *Id.* at 960. If society as a whole *were* available to make the determination, he posited, then the accused's "fate must, from the very nature of society, be decided by the voice of the majority[.]" *Id.* But, since only *representatives* of society are available it is "reasonable" to demand that "the unanimous voice of those who represent parties

---

recognized as an architect of our republic. *Id.* His Philadelphia lectures on the Constitution were attended by the Nation's founders, including the President. *Id.* at 403.

[10] Justice Wilson also rewrote the Pennsylvania Constitution in 1790, excising the previous explicit unanimity requirement and stating simply, "That trial by jury shall be as heretofore, and the right thereof remain inviolate." Pa. Const. art. IX, § VI. *See* Leonard W. Levy, *Seasoned Judgments: The American Constitution, Rights, and History* 52 (1995). It is inconceivable that Justice Wilson, while lecturing on the importance of unanimity, intended to strip the protection from the Pennsylvania Constitution. The only reasonable interpretation is that he believed its mention would have been redundant.

should be necessary to warrant a sentence of condemnation." *Id.*[11]

Justice Wilson further expounded on this theme, and the need to carefully delegate society's discretionary powers, with these eloquent words:

> When they are exercised by the people themselves, a majority, by the very constitution of society, is sufficient for the purpose. When they are exercised by a *delegation* from the people, in the case of an individual, it would be difficult to suggest, for his security, any provision more efficacious than one, that nothing shall be suffered to operate against him without the *unanimous* consent of the delegated body.

Id. at 961 (emphasis added). Referring back to these principles, Wilson then declared, "*It cannot have escaped you, that I have been describing the principles of our well known trial by jury.*" *Id.* at 962 (emphasis added). For Justice Wilson, unanimity was not separate from the right to jury, but part of its foundation.

Justice Wilson repeatedly made clear that the jury protection would be anemic if it did not require unanimity:

- "Can the voice of the state be indicated more strongly, than by the unanimous

---

[11] He found the history in support of unanimity in civil cases much more clouded, and believed unanimity was not required. He reasoned that a majority vote would suffice for resolution of conflict between two private parties. *Id.* at 987.

voice of this selected jury?" *Wilson, supra*, at 985.

- "How stands the other party to a criminal prosecution? He stands single and unconnected. He is accused of a crime. The greatest security is provided by declaring, and by reducing to practice the declaration, that he shall not suffer, unless the selected body who act for his country say unanimously and without hesitation—he deserves to suffer." *Id.* at 986.

Interposing itself between the accused and the zealous prosecutor, the jury speaks with authority precisely because it speaks with a single, unified, unanimous voice.

In his lecture, Justice Wilson showed particular concern for unanimity in capital cases. In such "transaction[s], of all human transactions the most important," he taught, jurors must "form[] the[ir] *collected verdict of the whole from the separate judgment of each*." *Id.* (emphasis added). Nowhere is this more important than when a person is "'judged to death.'" *Id.*

Justice Wilson covered other topics in his lecture on the jury right. But he showed his particular admiration for the "criminal" and "capital" jury by describing the right in his closing words as "sublime" and comparing it to an "edifice" with "strong and lofty" walls, and within which "freedom enjoys protection, and innocence rests secure." *Id.* at 1011. As his lecture showed, unanimity, for this Founder, served as the structure's cornerstone.

E. Early Practices, Rulings, And Scholars Confirmed The Universal Understanding That Unanimity Was Inherent In The Jury Right.

The Founders held a common understanding of the English jury right, the same right British soldiers and William Penn each enjoyed in high-profile trials an ocean and a century apart. As seen further in the early case law, founding-era grand jury instructions, and statements of the early scholars reviewed below, this understanding was universally shared throughout the early states. That this jury right unquestionably encompassed unanimity could not have been lost on those who ratified the Sixth Amendment.

1. Early court decisions (from the founding era to the middle of the nineteenth century) confirm the role of unanimity as an integral part of the jury right inherited from the English.

Neither New Hampshire nor Ohio nor Georgia's state constitutions explicitly mentioned unanimity as part of the jury right,[12] but their high courts found it integral.

In New Hampshire, the legislature asked the high court whether it could permit non-unanimous jury verdicts or juries of less than twelve. *Opinion of Justices*, 41 N.H. 550, 550 (1860). The court's unanimous answer was no, on both counts. The court

---

[12] Ga. Const. of 1798, § 6 ("Freedom of the press, and trial by jury, as heretofore used in this State, shall remain inviolate"); NH Const. of 1783 (barring deprivation of "life, liberty, or estate, but by the judgment of his peers or the law of the land"); Oh. Const. of 1851, art. 1, § 1.05.

noted that no right was "more strenuously insisted upon" by the Founders than the jury trial right, which had a well-settled single meaning, described in "[a]ll the books of the law," and "always to be understood and explained in that sense in which it was used at the time when the constitution and the laws were adopted." *Id.* at 551. Because "no such thing as a jury of less than twelve men, or a jury deciding by less than twelve voices had ever been known, or ever been the subject of discussion in any country of the common law" the court held that the legislature had no power to enact legislation along these lines. *Id.* at 551-52.

The Ohio Supreme Court reached the identical conclusion about a state statute, with virtually the identical reasoning. The court observed that the jury-trial right is "sufficiently understood, and referred to as a matter already familiar[,] definite as any other in the whole range of legal learning." *Work v. State*, 2 Ohio St. 296, 302 (1853). Extolling this "bulwark of the liberties of Englishmen," the court found it "beyond controversy" that its "number must be twelve, they must be impartially selected, and must unanimously concur " *Id.* at 304. The court therefore concluded that the legislature could not authorize non-unanimous criminal juries. *Id.* at 304.

The Georgia Supreme Court likewise concluded that the "sum and substance of this trial by jury" is that every accusation must be "confirmed by the unanimous suffrage of twelve of the prisoner's equals and neighbors " *Rouse v. State*, 4 Ga. 136, 147 (1848). After quoting at length the Blackstone common-law jury definition (which includes unanimity), the court found it "obvious that the

framers of [Georgia's 1798] Constitution, instead of incorporating the whole of this passage in that instrument, simply declare that the trial by jury, as therein delineated, shall remain inviolate." *Id.* *See also Inhabitants of Mendon v. Worcester Cnty.*, 27 Mass. 235, 246-47 (1830) (calling unanimity "one of the known incidents of a jury trial"); *State v. Christmas*, 20 N.C. 545, 411-12 (1839) (noting that unanimity required in state constitution based on common-law jury right).

Other early decisions noted the requirement of unanimity more or less in passing, taking for granted its application, including in states whose constitutions did not explicitly reference it.[13] *See State v. Porter*, 4 Del. 556, 557 (1 Harr. 1844); *Root v. Sherwood*, 6 Johns. 68, 69 (N.Y. Sup. Ct. 1810); *State v. Hall*, 9 N.J.L. 256, 262-63 (N.J. Sup. Ct. 1827); *State v. Baldwin*, 5 S.C.L. 309, 306-07 (S.C. Const. App. 1813); *Commonwealth v. Cawood*, 4 Va. 527, 533 (Va. Gen. Ct. 1826) (referring to unanimity as "Law of the land" and citing Blackstone rather than Virginia Constitution). Federal courts, interpreting the non-explicit federal constitutional jury right, did the same. *See United States v. Lawrence*, 26 F. Cas. 886, 887 (C.C.D.D.C. 1835).

And nowhere did the early courts express greater concern for unanimity than in capital cases. *See United States v. Perez*, 22 U.S. 579, 580 (1824) (Story, J.) (stating regarding hung juries that "in

---

[13] Only the constitutions of North Carolina (1776), Pennsylvania (1776), Virginia (1776), and Vermont (1786) were explicit. *See* Cogan, *supra*, at 410-13 (collecting state provisions). As noted above, Pennsylvania later excised the explicit requirement. *See* Note 10, *supra*.

capital cases especially, Courts should be extremely careful how they interfere with any of the chances of life, in favour of the prisoner"); *Atkins v. State*, 16 Ark. 568, 578 (1855) (encouraging caution before discharge of hung juries and quoting Justice Story in *Perez*); *Monroe v. State*, 5 Ga. 85, 148 (1848) (reversing capital murder conviction due to sequestration arrangements that undermined unanimity and stating: "God forbid that the prisoner should be sent to pray of the mercy of the Executive, a reprieve for an offence of which he has not been legally convicted."); *Nomaque v. People*, 1 Ill. 145, 148-50 (1825) (similar concern about practice promoting non-unanimous verdict in capital case); *Ned v. State*, 7 Port. 187, 216 (Ala. 1838); *Commonwealth v. Roby*, 29 Mass. 496, 519-20 (1832); *State v. Garrigues*, 2 N.C. 241, 241-42 (Super. L. & Eq. 1795); *Commonwealth v. Cook*, 6 Serg. & Rawle 577, 585 (Pa. 1822); *State v. McLemore*, 20 S.C.L. 680, 683 (S.C. L. & Eq. 1835). *See also Andres v. United States*, 333 U.S. 740, 752 (1948) (noting that an "instruction that a juror should not join a verdict of guilty, without qualification" of the statutory mercy recommendation "if he is convinced that capital punishment should not be inflicted" would be proper under federal capital statute).

2. In early grand jury addresses, judges instructed on the narrow charges sought by the government, but also expounded upon the fair legal system under which the accused (if indicted) would be tried. The charges were always published in the newspapers and widely read. *See generally Krauss, supra* (collecting grand jury addresses). And they frequently included paeans to the jury right inherited from England. From shortly after Independence to

after ratification of the Bill of Rights, they continued to refer to unanimity as part and parcel of that right.

For example, in 1779, a Georgia judge instructed:

> The trial by juries, [is] one of the most valuable rights we enjoy That no person can be subjected to the punishment consequent to the infringement of the laws, but on the verdict of twelve men, his equals in rank and condition of life, is of itself a must valuable privilege, and one of the best safeguards for [] life, liberty and fortune

Id. at 35. In 1784, a Kentucky judge channeled Blackstone and emphasized the jury right, its role as bulwark, protector of the people's liberties, and a "sacred" and "inviolate" "palladium." *Id.* at 281. He explained that the accused could not be convicted but upon a unanimous verdict *Id. See also id.* at 285 (similar).

In 1790, U.S. District Judge David Sewell instructed a grand jury regarding a felony alleged on the high seas. *Id.* at 1392. He stated that before the Revolution, a bare majority in a court of admiralty could convict. Now, however, "no man's life is brought into hazzard until twelve good and lawful men shall unanimously determine the charge to be true." *Id.* In 1792, despite that the recently-passed Sixth Amendment did not mention unanimity, U.S. District Judge Harry Innes instructed on the time-honored jury right and stated

that the jury's "unanimous voice is necessary to find [the accused] guilty." *Id.* at 1433.

Indeed, instructions that unanimity was part of the jury right were commonplace. *See id.* 39 (GA, 1779, Chief-Justice Anthony Stokes and Justice Martin Jollie), 109 (GA, 1792, John Houstoun), 207 (GA, 1798, Thomas Carnes), 297 (MD, 1781, Robert Hanson), 531 (MA, Robert Treat Paine, undated), 570 (NH, 1790, John Pickering), 731 (NW Territory, now OH, 1795, William Goforth) 773 (PA, 1785, Henry Slagle), 783 (PA, 1791, Enoch Edwards), 814 (PA, 1792, Alexander Addison), 1069 (PA, 1800, Edward Shippen), 1098 (PA, 1788, McKean), 1259 (SC, 1791, Elihu Hall Bay). Justices of this Court riding circuit gave similar addresses. *See, e.g.*, 3 *The Documentary History of the Supreme Court of the United States, 1789-1800*, 31 (Blair, J., 1795), 410 (Chase, J., 1800), 460-62 (Paterson, undated) (Maeva Marcus ed., 1992); 2 *Id.* at 485 (Blair, J., 1794).

3. The early scholars interpreting the Sixth Amendment jury right agreed. In 1803, just after passage of the Bill of Rights, St. George Tucker wrote that the Sixth Amendment secured the trial by jury described by Blackstone, and stated that no person could be "condemned of any crime" without a jury's "unanimous verdict, or consent." 1 St. George Tucker, *Blackstone's Commentaries App.* 34 (Birch & Small eds. 1803); *id.* at Vol. 5, at 348-49 n.2 (citing 4 Blackstone Commentaries 349-50).

Two decades later, in his influential treatise on American Law, Nathan Dane took the same view. 6 Nathan Dane, *General Abridgement and Digest of American Law* 226 (Boston: Cummings, Hilliard & Co. eds. 1823) (stating Bill of Rights provides that

"the jury in criminal matters must be unanimous"). So too did Justice Story, who understood that the phrase "trial by jury" meant "twelve men, impartially selected, who must unanimously concur in the guilt of the accused before a legal conviction can be had." 2 Story Commentaries 559. He went further to add that "any law dispensing with any of these requisites may be considered unconstitutional." *Id.*

After ratification of the Fourteenth Amendment, Joel Prentiss Bishop published his treatise, which too agreed that a jury trial is one where guilt is determined "by the unanimous finding of twelve impartial men, termed jurors," and that a "statute providing otherwise is void." 1 Joel Prentiss Bishop, *Criminal Procedure; or, Commentaries on the Law of Pleading and Evidence and The Practice in Criminal Cases* 531-32 (1880). *See also* John Norton Pomeroy, *An Introduction to Municipal Law* 78 (1864) (observing that the principle of unanimity "once adopted has continued as an essential part of the jury trial."); Thomas Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 319-320 (1868) (explaining that "common law incidents to a jury trial" that were "preserved by the constitution" included unanimity requirement).

The courts, judges and scholars of the era, then, shared in the understanding that the right to a jury meant the right to a unanimous jury. This was so since the founding and through the ratification of the Fourteenth Amendment.[14] As those who ratified

---

[14] As the plurality in *Apodaca* noted, while the Carolinas, Connecticut, and Pennsylvania had previously allowed non-unanimous verdicts in the early seventeenth century, they no

the Constitution would have understood, nothing in these authorities permitted bare majority jury decisions in serious criminal matters, much less determinations of facts necessary for a death sentence.

F. This Court's Precedents Confirm Unanimity's Integral Role.

The above history jibes with the "unbroken line of cases" beginning in the late 1800's in which "the Justices of this Court have recognized, virtually without dissent, that unanimity is one of the indispensable features of the federal jury trial." *Johnson v. Louisiana*, 406 U.S. 366, 369 (1972) (Powell, J., concurring). *See also Apodaca*, 406 U.S. at 415-16 (Stewart, J., dissenting) (collecting cases). Albeit in federal trials, these decisions interpret the same Sixth Amendment jury right at issue here.

Chronologically first among these cases is *Thompson v. Utah*, 170 U.S. 343, 355 (1898), *overruled on other grounds by Collins v. Youngblood*, 497 U.S. 37, 38 (1990), which interpreted the jury right set forth in the Sixth Amendment and in Article III, § 2. Despite the lack of explicit reference to unanimity in either provision, this Court had no trouble finding that it is required. The Court held that the "United States gave the accused, at the time of the commission of his offense, the right to be tried by a jury of twelve persons, and made it impossible to deprive him of his liberty except by the unanimous verdict of such a jury." *Id.* at 355. *See also Am. Pub. Co. v. Fisher*, 166 U.S. 464, 468 (1897) (noting in civil

---

longer did by the time of the framing of the Constitution. 406 U.S. at 408 n.3.

case that "unanimity" was essential to the common-law jury right); *Swain v. Alabama*, 380 U.S. 202, 211 (1965) (noting that "an impartial jury of 12 men who must unanimously agree on a verdict" is the common law system, and that "followed in the federal courts by virtue of the Sixth Amendment"), *overruled on other grounds by Batson v. Kentucky*, 476 U.S. 79 (1986); *Allen v. United States*, 164 U.S. 492, 501 (1896) (noting "[t]he very object of the jury system is to secure unanimity by a comparison of views, and by arguments among the jurors themselves"); *Duncan*, 391 U.S. at 151-52 (referring to Blackstone's description when incorporating the Sixth Amendment).

G. *Apodaca v. Oregon* Does Not Determine The Result In This Case.

Four justices of the *Apodaca* plurality reached a conclusion at least partly in conflict with the history above, finding that Congress omitted the unanimity requirement from the Sixth Amendment's final text for "substantive effect," and that unanimity was not integral to the jury's role as a safeguard against the overzealous prosecutor or biased judge. 406 U.S. at 409-10. But the plurality then focused its analysis on the Oregon statute under challenge, which allowed conviction upon 10-2 or 11-1 verdicts. *Id.* at 411. Ultimately, the plurality "perceive[d] no difference between juries required to act unanimously and those permitted to convict or acquit by votes of 10 to two or 11 to one." *Id.*

For several reasons, the *Apodaca* plurality's conclusions pose no obstacle to the Court now finding a historical basis for interpreting the Sixth Amendment to require that more than a bare

majority of a capital jury find the facts necessary for a death sentence.[15]

First, only four justices believed that the Sixth Amendment jury right did not encompass unanimity. *Id.* at 410. But five found that the right contemplated unanimous juries. *Id.* at 414 (Stewart, J., dissenting); *Johnson*, 406 U.S. at 381 (Douglas, J., dissenting). Justice Powell was among these five with regard to federal criminal trials, *id.* at 371 (Powell, J. concurring), but he held to the solitary view that "there is no sound basis for interpreting the Fourteenth Amendment to require blind adherence by the States to all details of the federal Sixth Amendment standards." *Id.* at 375. The Court has since called Justice Powell's analysis into question. *See McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 766 n.14 (2010) (identifying *Apodaca* as the sole exception in a long line of cases holding that incorporated Bill of Rights protections are to be enforced under the Fourteenth Amendment equally against the states and the federal government and noting the decision was "the result of an unusual division among the Justices, not an endorsement of the two-track approach to incorporation").

Second, as the plurality acknowledged, it was not deciding a capital case, 406 U.S. at 406 n.1 (quoting Oregon Constitution limiting non-unanimous juries to non-capital cases), much less one

---

[15] For additional reasons persuasively outlined in petitioner's brief, *Apodaca* poses no barrier to relief for Hurst. Most significantly, Florida's sentencing scheme relegates the jury to an advisory role, and thus does not entrust to the jury the fact finding *Ring* requires. A decision on that basis would steer far clear of any possible conflict with *Apodaca*.

involving fact finding that would make a person eligible for execution. That makes a "significant constitutional difference," *Beck v. Alabama*, 447 U.S. 625, 637 (1980), because the Court has cautioned against "procedural rules that tended to diminish the reliability of the sentencing determination." *Id.* at 638. As petitioner has shown, Pet. Br. at 47-51, Florida's procedures in fact do diminish the reliability of its capital sentencing determinations.

Third, not even the plurality entirely denigrated the important role of unanimity in the jury right. Again, it merely saw "no difference between juries required to act unanimously and those permitted to convict or acquit by votes of 10 to two or 11 to one." *Apodaca*, 406 U.S. at 411. Florida law, by contrast, permits executions even when only a bare majority of the jury recommends that sentence, and without any provision requiring more than a majority to endorse any single aggravator. Petitioner's jury voted seven to five for execution and, as shown in his brief, Pet. Br. at 2, 7-8, it is possible that as few as three or four jurors found the presented aggravators. This difference too is constitutionally significant. *See Johnson*, 406 U.S. at 366 (Blackmun, J, concurring) ("I do not hesitate to say, either, that a system employing a 7—5 standard, rather than a 9—3 or 75% minimum, would afford me great difficulty.").

Fourth, and most to the point of this history brief, the *Apodaca* plurality's conclusions about the history of the Sixth Amendment and the Framer's understanding of the jury right were simply incorrect. The plurality acknowledged but then rejected the possibility that Congress "eliminated

references to unanimity" not for substantive effect, but "because [it was] thought already to be implicit in the very concept of jury." *Apodaca*, 406 U.S. at 409-10 (emphasis added). As shown in the detailed history above, the plurality chose the wrong alternative. Framers, judges, and scholars writing before, during and after the Bill of Rights was written and ratified all agreed that the jury right our Founders fought for was the English common-law right. That right indisputably encompassed unanimity. *See, e.g.* 4 Blackstone Commentary 343.

Fifth, since *Apodaca*, the Court has repeatedly assumed the applicability of the unanimity rule to state criminal prosecutions. *See Apprendi*, 530 U.S. at 477 (noting requirement of facts "confirmed by the unanimous suffrage of twelve of [accused's] equals and neighbours" and quoting Blackstone); *Blakely v. Washington*, 542 U.S. 296, 303 (2004) (quoting *Apprendi* and Blackstone); *S. Union Co. v. United States*, __ U.S. __, 132 S. Ct. 2344, 2355 (2012) (same). *See also Ring*, 536 U.S. at 610 (Scalia, J., concurring).

***

The historical record thus overwhelmingly supports the Court's assumption of unanimity as part of the jury right in the *Apprendi* line of cases. At a minimum, this record demonstrates that a jury vote of seven to five (or less) to determine facts predicate to a death sentence is insufficient under the Sixth Amendment, the Eighth Amendment, and *Ring*. Because Hurst was denied these protections, his death sentence should be reversed.

II. FLORIDA'S DISREGARD OF THE JURY'S HISTORIC ROLE IN CAPITAL SENTENCING ALSO VIOLATES THE EIGHTH AMENDMENT.

Amici agree with petitioner that the Florida capital sentencing scheme violates the Eighth Amendment because it: (1) deprives the jury of the ability to "'express the conscience of the community on the ultimate question of life or death.'" *Ring*, 536 U.S. at 615-16 (Breyer, J., concurring) (quoting *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968)); (2) fails to produce the reliable outcomes this Court's jurisprudence requires, *see, e.g.*, *Beck*, 447 U.S. at 638; and (3) falls far outside the consensus practice of death-penalty jurisdictions by not entrusting a jury with the authority to sentence, or even to find facts needed for a death sentence. *See, e.g.*, *Hall v. Florida*, __ U.S. __, 134 S. Ct. 1986, 1992 (2014). *See* Pet. Br. at 35, 47-49 (setting forth these various arguments, including asking this Court to overrule *Spaziano v. Florida*, 468 U.S. 447 (1984)).

Here, too, history supports petitioner's view of the jury's role in capital cases.

A. The Jurors Of Common-Law England Decided The Facts That Determined If A Case Was Capital.

English juries, always unanimous, 2 Blackstone Commentaries 343, played a pivotal role in deciding if the accused would live or die. Historian Thomas Green has proven, in his authoritative analysis of early English juries, that, as early as the thirteenth century, jurors refused to convict on capital charges when they believed the crimes were

unworthy of execution. Green, *supra*, at 28-64;[16] *see also* Abramson, *supra*, at 217 (citing Green). *Cf. Jones v. United States*, 526 U.S. 227, 246 (1999) (citing Green's work); *Walton v. Arizona*, 497 U.S. 639, 711 n.3 (1990) (Stevens, J., dissenting) (citing Green's work), *overruled by Ring*, 536 U.S. at 586.

Green's analysis begins with thirteenth century English juries. Their "power to determine the defendant's fate was virtually absolute." *Green, supra,* at 19. Those acquitted were released. *Id.* "The guilty were hanged almost immediately." *Id.* Indeed, the judgment of conviction was termed "'*suspendatus est*,' ('he is hanged.')." Green, *The Jury and the English Law of Homicide, 1200-1600*, 74 Mich. L. Rev. at 424. Juries in effect were deciding the "appropriate circumstances under which a person's life might be surrendered to the Crown." *Green, supra,* at 20. *See also Apprendi*, 530 U.S. at 579-80 (showing that laws "prescrib[ing] a particular sentence for each offense" limited authority of English judges).

One of the tools at the jury's disposal in the Middle Ages was to decide if a homicide was committed in self-defense, a powerful means of saving the accused given the lack of gradations of homicide in that era. Green, *The Jury and the English Law of Homicide*, 1200-1600, 74 Mich. L. Rev. at 415, 427-36. Examining the ancient verdicts, Green found that "the frequent recourse to such

---

[16] *See also* Thomas Andrew Green, *The Jury and the English Law of Homicide, 1200-1600*, 74 Mich. L. Rev. 413 (1976). For clarification, cites to "Green," *supra*, continue to refer to Green's book, while subsequent cites to this article will employ its short form.

findings resulted mainly from the jury's desire to save the lives of defendants who had committed simple homicide." *Id.* at 431. The juries did so to limit homicide convictions to the "most culpable homicides." *Id.* at 432. *See also id.* at 416 (finding "the local community considered" execution "appropriate mainly for the real evildoer: the stealthy slayer who took his victim by surprise and without provocation"); *McGautha v. California*, 402 U.S. 183, 197-98 (1971) (recounting this history), *overruled on other grounds by Furman v. Georgia*, 408 U.S. 238 (1972).

The jury later found a tool in the "benefit of clergy," originally designed to try and punish ordained clergy in the Church rather than the courts, but eventually extended (in the courts) to anyone literate enough to recite a Bible verse. Green, *supra*, at 117. The jury's role was to decide if the crime committed qualified for the benefit, which would result in branding of the convicted and a year's imprisonment. *Id.* at 118. In the case of homicide, that meant deciding whether the crime was manslaughter or murder. *Id.* at 121-22. As jurors "recogniz[ed] that benefit of clergy provided an alternative sanction [to execution] for simple homicide," the conviction rate went up, and the previously high rate of self-defense verdicts went down. *Id.* at 122. The percentage of offenders condemned to death, over this period, "remained about the same," *id.* at 122, preserving over time the jury's unique role as arbiter of community sentiment. *See Ring*, 536 U.S. at 615 (Breyer, J., concurring). *See also McGautha*, 402 U.S. at 197-98 (recounting this same history).

In the sixteenth and seventeenth centuries, new legal distinctions between capital and non-capital alternatives allowed the jury to do the work of deciding whom was fit for execution:

> Many of those indicted for grand larceny were, by virtue of the jury's undervaluation of the goods stolen or their own plea of guilty to a lesser offense, convicted of petty larceny, which was not capital, just as some of those indicted for murder were mercifully convicted of manslaughter. Convictions were high in those capital felonies that had long been viewed as particularly heinous and in those non-capital offenses that had come to serve as catchalls much as self defense had in earlier times.

Green, supra, at 107. Thus, in common-law England, the jury played the role, still relevant today, of deciding whether the "culpability of the prisoner is so serious that the ultimate penalty must be sought and imposed." *Kennedy v. Louisiana*, 554 U.S. 407, 442 (2008) (internal citation and quotation marks omitted).

During the founding era and before, English society generally saw the jury's exercise of merciful discretion as appropriate, rather than a nefarious species of nullification. *Id.* at 311-15. In fact, while the jury held the ultimate power, the bench itself frequently encouraged juries to "undervalue goods and convict the defendant of a clergyable offense. out of compassion, to do rough justice in cases where the punishment would have appeared

disproportionate to the culpability of the offender." *Id.* at 149. *See also id.* at 286 (recounting similar judicial encouragement).

As Green explains, "so long as the sanction for felony remained so severe, and so long as it applied at least in theory to so large a field of cases, the very nature of the trial was bound to be seen as related to the concept of merciful verdicts." *Id.* And of course the nature of an English criminal trial required unanimous verdicts; such consequential matters were never decided by a bare majority.

B. American Juries At The Time Of Our Founding Carried On With The Pivotal Role In The Execution Decision.

Unanimous juries played an exclusive role in capital decisions in our new Nation too. The Court has already reviewed the history in detail. *See Woodson*, 428 U.S. at 289-93; *McGautha*, 402 U.S. at 197-201. In *Woodson*, the Court observed that at "least since the Revolution, American jurors have, with some regularity, disregarded their oaths and refused to convict defendants where a death sentence was the automatic consequence of a guilty verdict." 428 U.S. at 293. Juries' refusals to return verdicts of guilty to avoid the consequence of execution drove the movement behind reducing "the number of capital offenses and to separate murder into degrees." *Id.*

The first reform was for the state to limit "classes of capital offenses." *Id.* at 290 (footnote omitted). Even then, juries would refuse to "convict murderers rather than subject them to automatic

death sentences." *Id.* The next step, led by Pennsylvania in 1794, was to separate murder into degrees and confine mandatory execution to deliberate and premeditated killings. *Id.* Other states followed until the practice became nearly universal. *Id.*

Juries however "continued to find the death penalty inappropriate in a significant number of first-degree murder cases and refused to return guilty verdicts for that crime." *Id.* at 291. The next set of reforms came in the antebellum era, and allowed juries deciding guilt also to recommend mercy. *Id.* By the turn of the century, 23 states plus the federal government had adopted the practice. *Id.*

This Court's interpretation of Congress's 1897 statute highlighted the singular role of juries in capital sentencing. *See Winston v. United States*, 172 U.S. 303 (1899). There, the Court reversed a murder conviction because the trial judge had instructed the jury that a mercy recommendation was warranted only if it found mitigating circumstances. *Id.* at 313. The Court found this charge thwarted Congress's design to commit the question of execution to the "judgment and the consciences of the jury." *Id.* at 312-13. The question of mercy was thus exclusively reserved for the jury. It was for the jury alone to weigh in its decision "age, sex, ignorance, illness or intoxication, of human passion or weakness, of sympathy or clemency, or the irrevocableness of an executed sentence of death. or any other consideration whatever[.]" *Id.* The Court relied in part on the consistent practices of the states interpreting similar schemes. *Id.* (collecting state cases from the era).

By the end of World War I, "all but eight States, Hawaii, and the District of Columbia either had adopted discretionary death penalty schemes or abolished the death penalty altogether." *Woodson*, 428 U.S. at 291. "By 1963, all of these remaining jurisdictions had replaced their automatic death penalty statutes with discretionary jury sentencing." *Id.* at 291-92. *See also generally McGautha*, 402 U.S. at 197-201 (recounting same history). And across these capital jurisdictions, neither the old mandatory procedures nor the new discretionary ones allowed death sentences upon the factual findings of a non-unanimous jury. *See* Abramson, *supra*, at 180-81 (noting only exception to requirement of unanimous, twelve-person juries has been non-capital cases in Louisiana and Oregon, and Florida's capital sentencing scheme).

Petitioner brings this history to the present with his showing that all capital jurisdictions, except for Florida, presently require a jury to unanimously find the aggravators required for a death sentence, and only four jurisdictions join Florida in leaving the final sentencing decision to the judge. Pet. Br. at 29, 42-43. Ironically, the Florida Legislature's move to eliminate the jury's role only in capital sentencing, while establishing aggravators that must be proven for a death sentence, came in response to *Furman v. Georgia*, 408 U.S. 238 (1972). *See* Charles W. Ehrhardt et al., *The Aftermath of Furman: The Florida Experience*, 64 J. Crim. L. & Criminology 2, 12, 15-17 (1973).

As in England, American juries' decisions have long been conclusive as to which people and which crimes are deserving of society's most severe

punishment. *See also* Wilson, *supra*, at 1008-09 (arguing that the power to decide if a "fellow citizen shall live or die" is a burden and responsibility too great for any one person). Juries speak for society and the local community in particular. They serve as a critical barometer. When a capital sentencing scheme relegates jurors to an advisory role, and a bare majority votes on facts necessary for a death sentence, the purpose of retribution cannot be properly served, *Kennedy*, 554 U.S. at 442, the requisite reliability cannot be achieved, *Beck*, 447 U.S. at 638, and the scheme falls outside of a consensus for determining a death sentence that is humane and just. *Hall*, 134 S. Ct. at 1007.

Because Hurst was sentenced to death under such a constitutionally faulty scheme, his death sentence must be reversed.

CONCLUSION

The judgment of the Florida Supreme Court should be reversed.

Respectfully submitted,

Brian W. Stull
Counsel of Record
Cassandra Stubbs
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
201 W. Main Street,
Suite 402
Durham, NC 27707
(919) 682-9469
bstull@aclu.org

Steven R. Shapiro
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, NY 10004

Nancy G. Abudu
AMERICAN CIVIL LIBERTIES UNION OF FLORIDA
4500 Biscayne Blvd.,
Suite 340
Miami, FL 33137

Elizabeth B. Wydra
Brianne J. Gorod
CONSTITUTIONAL
ACCOUNTABILITY CENTER
1200 18th St., N.W.,
Suite 501
Washington, D.C. 20036

Clifford M. Sloan
Paul M. Kerlin
Marisa B. Van Saanen
James C. Altman
SKADDEN, ARPS, SLATE
MEAGHER & FLOM LLP
1440 New York Ave., N.W.
Washington, D.C. 20005

Dated: June 3, 2015

No. 14-7505

IN THE

Supreme Court of the United States

Court, U.S.
FILED
JUN - 4 2015
OFFICE OF THE CLERK

TIMOTHY LEE HURST,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

BRIEF OF *AMICI CURIAE* FORMER FLORIDA CIRCUIT COURT JUDGES IN SUPPORT OF PETITIONER

STUART L. HARTSTONE
ATTORNEY AT LAW
STUART L. HARTSTONE, P.A.
5112 Ventura Drive
Delray Beach, Florida 33484
(607) 227-8051

SONYA RUDENSTINE
ATTORNEY AT LAW
Counsel of Record
2531 N.W. 41st Street, Suite E
Gainesville, Florida 32606
(352) 374-0604
srudenstine@yahoo.com

Counsel for Amici Curiae

259899

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

Page

TABLE OF CONTENTS..... i

TABLE OF CITED AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF THE ARGUMENT... 4

ARGUMENT.. 6

THE DECISION TO IMPOSE A DEATH SENTENCE HAS UNIQUE FEATURES THAT REQUIRE IT BE MADE BY A JURY OF LAY CITIZENS. 6

A. Whether Retribution Demands a Death Sentence is a Determination Best Made by a Jury..... 9

B. Because of the Central Role of Mitigation in Post-*Gregg* Capital Sentencing, the Decision Whether to Impose a Death Sentence Should Be Made by a Jury 11

C. The Advisory Jury under Florida's Death-Penalty Scheme Fails to Satisfy the Eighth Amendment's Reliability Requisite 14

CONCLUSION 18

TABLE OF CITED AUTHORITIES

Page

CASES

Abdul-Kabir v. Quarterman,
550 U.S. 233 (2007) .... .12, 13

Aguirre-Jarguin v. State,
9 So. 3d 593 (Fla. 2009).... ....6, 16, 17

Caldwell v. Mississippi,
472 U.S. 320 (1985)..... ....4, 6

California v. Brown,
479 U.S. 538 (1987)..... .... .5, 12

Duncan v. Louisiana,
391 U.S. 145 (1968). 4, 7-8

Eddings v. Oklahoma,
455 U.S. 104 (1982). .... .12

Furman v. Georgia,
408 U.S. 238 (1972)..... ....5, 6, 14, 15

Gregg v. Georgia,
428 U.S. 153 (1976). 4, 6-7, 9, 11

Harris v. Alabama,
513 U.S. 504 (1995).. 9

Hitchcock v. Dugger,
481 U.S. 393 (1986). 12

Cited Authorities

Page

Kennedy v. Louisiana,
554 U.S. 407 (2008) 4, 9-10

Lamadline v. State,
303 So. 2d 17 (Fla. 1974) ..... .16

Lockett v. Ohio,
438 U.S. 586 (1978) 12, 15

Lowenfield v. Phelps,
484 U.S. 231 (1988) 5, 11

Panetti v. Quarterman,
551 U.S. 930 (2007) 5, 10

Payne v. Tennessee,
501 U.S. 808 (1991) 13

Penry v. Lynaugh,
492 U.S. 302 (1989) 5, 12, 16

Proffitt v. Florida,
428 U.S. 242 (1976) 15

Ring v. Arizona,
536 U.S. 584 (2002) ..... *passim*

Roper v. Simmons,
543 U.S. 551 (2005) 13

Schriro v. Summerlin,
542 U.S. 348 (2004) 13, 14

Cited Authorities

Page

Skipper v. South Carolina,
476 U.S. 1 (1986) 12

Spaziano v. Florida,
468 U.S. 447 (1984) 8, 9, 14, 15

Sumner v. Shuman,
483 U.S. 66 (1987) ... .14

Teague v. Lane,
489 U.S. 288 (1989) 13

Tedder v. State,
322 So. 2d 908 (Fla. 1975) 5-6, 16

Tennard v. Dretke,
542 U.S. 274 (2004) 12

Trop v. Dulles,
356 U.S. 86 (1958) 13, 15

Tuilaepa v. California,
512 U.S. 967 (1994) 11-12

Witherspoon v. Illinois,
391 U.S. 510 (1968) 15, 17

Woodson v. North Carolina,
428 U.S. 280 (1976) 4, 6, 12, 14

Cited Authorities

Page

Woodward v. Alabama,
134 S. Ct. 405 (2013).. 7

Zant v. Stephens,
462 U.S. 862 (1983).. 11

STATUTES AND OTHER AUTHORITIES

Sixth Amendment to the U.S. Constitution..... *passim*

Eighth Amendment to the U.S. Constitution ... *passim*

Fourteenth Amendment to the U.S. Constitution.. *passim*

Sup. Ct. R. 37.3(a) 1

Sup. Ct. R. 37.6 1

Fla. Stat. § 921.141(2) 15

Fla. Stat. § 921.141(3) 15, 16

Fla. Std. Jury Instr. (Crim.) 7.11. 16

Leg. 268, 104th Leg., 1st Sess. (Neb. 2015) 7

Ehrhardt & Levinson, *Florida's Legislative Response to Furman: An Exercise in Futility?*,
64 J. Crim. L. & Criminology 10 (1973).. 15

Cited Authorities

Page

Judge O.H. Eaton, Jr., *Capital Punishment: A Failed Experiment (Part 2)*, 24 Florida Defender 56 (Spring 2012) 10

William J. Bowers, *et al.*, *The Decision Maker Matters: An Empirical Examination of the Way the Role of the Judge and the Jury Influence Death Penalty Decision-Making*, 63 Wash. & Lee L. Rev. 931 (2006) 16-17

INTEREST OF *AMICI CURIAE*[1]

Amici are former Florida jurists who presided over capital trials in their capacity as circuit court judges. *Amici* consist of a bipartisan group ranging across the political spectrum. *Amici* include both proponents and opponents of capital punishment, but all *Amici* agree that by providing judges, rather than juries, with the independent power to issue a death sentence, Florida's capital sentencing statute violates the Eighth Amendment to the United States Constitution.

The individual *Amici* are:

- Judge Thomas H. Bateman, III served on the Circuit Court for Florida's Second Judicial Circuit Court from 2001 through 2009, and as Leon County Court Judge from 1990 through 2001. While a jurist, he served as Associate Dean of the Florida College of Advanced Judicial Studies and a contributing faculty member to the AJS course entitled Handling Capital Cases, under the Chairmanship of *Amicus* Judge O.H. Eaton, Jr. Judge Bateman has served as a member of the Supreme Court of Florida's Criminal Court Steering Committee and twice served as Chair of The Florida Bar's Criminal Procedure Rules Committee. Before becoming a Judge, he served

1. Pursuant to Supreme Court Rules 37.3(a) and 37.6, *Amici Curiae* certify that no counsel for a party authored this brief in whole or part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of the brief, and that the parties have consented to the filing of this brief in letters submitted herewith.

as an Assistant Attorney General for the State of Florida, an Assistant Public Defender for Orange County, Florida, and a Deputy Sheriff for the Broward County Sheriff's Office.

- Judge Nikki Ann Clark served on the Circuit Court for Florida's Second Judicial Circuit from 1993 through 2009. She was then appointed to serve on the First District Court of Appeal in 2009 by Governor Charlie Crist and retired in 2015. She is a former Assistant Attorney General for the State of Florida and a former attorney for Legal Services of North Florida.

- Judge O.H. Eaton, Jr. served on the Circuit Court for Florida's Eighteenth Judicial Circuit Court from 1986 through 2010, including as Chief Judge. He was a member of the Florida Sentencing Commission from 1991 until 1998, and served as Chair of the Criminal Justice Section of the Florida Conference of Circuit Judges from 1994 through 1996. He was selected to be a member of the American Bar Association's Florida Capital Punishment Assessment Committee (2004-2005), and was the Chair of the Supreme Court of Florida's Criminal Court Steering Committee from its inception in 2002 until 2010. He teaches the Handling Capital Cases course at the Florida College of Advanced Judicial Studies and at the National Judicial College, University of Nevada, Reno.

- Judge Janet E. Ferris served on the Circuit Court for Florida's Second Judicial Circuit from 1999

through 2009. Prior to becoming a judge, she served as an assistant prosecutor in the Broward County State Attorney's Office, in the Florida Office of the Attorney General as the first Chief of the Civil RICO section, and as General Counsel to the Florida Department of Law Enforcement.

- Judge Martha Ann Lott served on the Circuit Court for Florida's Eighth Judicial Circuit from 1997-2013, and was Chief Judge from 2009 through 2012. She served as Alachua County Court Judge from 1991 through 1997. Prior to becoming a judge, she served as an assistant public defender and worked in private practice.

- Judge Philip J. Padovano served on the Circuit Court for Florida's Second Judicial Circuit from 1988 through 1996, at which time he was appointed to serve on the First District Court of Appeal until his retirement in 2015. For the past fifteen years, he has served as Chair of the Florida Bar Association's Committees on Florida Standard Jury Instructions in Criminal Cases and Committee to Recommend Minimum Standards for Lawyers in Capital Cases.

- Judge Larry G. Turner served on the Circuit Court for Florida's Eighth Judicial Circuit from 1997 through 2004. Early in his career, he served as an Assistant State Attorney for the Eighth Judicial Circuit, and then began work in private practice. He is a former President of the Florida Association for Criminal Defense Lawyers and has served as a member of the Executive Council

of Florida Bar Criminal Law Section for twelve years. Judge Turner has taught both academic and practice courses as an adjunct professor at the University of Florida Levin College of Law.

SUMMARY OF THE ARGUMENT

This Court repeatedly has held that, if it is to withstand Eighth Amendment scrutiny, capital sentencing requires heightened reliability and, thus, heightened procedural safeguards. *See, e.g., Caldwell v. Mississippi*, 472 U.S. 320, 323 (1985); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976); *Gregg v. Georgia*, 428 U.S. 153, 188-89 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.). Similarly, the Court has emphasized the importance of juries in protecting our citizenry from arbitrary government action that leads to the unjust deprivation of liberty. *See Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968). For three, interrelated reasons, *Amici*, all former Florida trial judges who have presided over capital trials, believe that, because a death sentence constitutes the ultimate deprivation of liberty, its application can have constitutional legitimacy only when it arises from the reasoned deliberations of twelve jurors who represent a cross-section of the community, not from the judgment of a single, elected jurist.

First, the primary goal of today's capital-sentencing statutes is retribution. Because retribution's goal is to reflect "society's and the victim's interest in seeing that the offender is repaid for the hurt he caused," *Kennedy v. Louisiana*, 554 U.S. 407, 442 (2008) (citations omitted), and because the decision to deprive the defendant of his or her life is so unique in kind and severity, the decision

that retribution demands imposition of the death penalty should only be made by twelve representatives of the "community as a whole," *Panetti v. Quarterman*, 551 U.S. 930, 958 (2007), as they "are more likely to express the 'conscience of the community'" than are judges. *Ring v. Arizona*, 536 U.S. 584, 615-16 (2002) (Breyer, J., concurring in judgment) (citation omitted).

Second, capital sentencing involves a weighing of aggravating and mitigating circumstances. The former are largely fact-bound circumstances designed to narrow the class of death-eligible defendants, *Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988), while the latter must take into account a vast array of evidence designed to ensure that the "sentence imposed . . . reflect[s] a reasoned *moral* response to the defendant's background, character, and crime." *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)). In short, the decision whether mitigating circumstances serve as a basis for sparing a defendant's life is distinctly dependent on contemporary community moral judgments and must therefore be made by the community's representatives – jurors – in order to ensure the reliability that the Eighth Amendment demands.

Finally, Florida's transition to judicial sentencing in capital cases was a result of the misguided interpretation of *Furman v. Georgia*, 408 U.S. 238 (1972), as prohibiting all discretionary capital sentencing by juries. The Supreme Court of Florida later endeavored to fix this error by requiring trial judges to give "great weight" to a jury's advisory verdict when determining whether to sentence a defendant to death. *Tedder v. State*, 322 So. 2d

908, 910 (Fla. 1975). But without requiring jurors to report specific findings as to which aggravating and mitigating circumstances they found and how those circumstances were applied, and without defining the meaning of "great weight," the Supreme Court left trial judges to apply an undefined term to an undefined verdict. When the requirement that judges substitute their own judgment for that of the "conscience of the community" is combined with the uncertainty of having to apply "great weight" to an "essentially meaningless" jury verdict, *Aguirre-Jarguin v. State*, 9 So. 3d 593, 611 (Fla. 2009) (Pariente, J., specially concurring), the heightened safeguards required before imposition of the ultimate sentence all but disappear in Florida. *Amici* therefore believe this Court should find Florida's death-sentencing statute unconstitutional under the Eighth Amendment.

ARGUMENT

THE DECISION TO IMPOSE A DEATH SENTENCE HAS UNIQUE FEATURES THAT REQUIRE IT BE MADE BY A JURY OF LAY CITIZENS.

This Court has long recognized that death is fundamentally different in kind from any other punishment that society may impose. *Furman v. Georgia*, 408 U.S. 238, 286-291 (1972) (Brennan J., concurring). The "qualitative difference" in its finality, *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976), demands a correspondingly "heightened 'need for reliability in the determination that death is the appropriate punishment in a specific case.'" *Caldwell v. Mississippi*, 472 U.S. 320, 323 (1985) (quoting *Woodson*, 428 U.S. at 305 (1976)). In *Gregg v. Georgia*, 428

U.S. 153, 188-89 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.), this Court made clear that in order for a state's capital punishment scheme to withstand Eighth Amendment scrutiny, states are required to apply special procedural safeguards to "minimize the risk of wholly arbitrary and capricious action" in imposing the death penalty. As former Florida trial judges with significant experience presiding over capital trials, *Amici* have come to the conclusion that, in keeping with the death-penalty schemes of the federal system and the vast majority of states,[2] "[o]ne such safeguard . . . is that a jury, and not a judge, should impose any sentence of death." *Woodward v. Alabama*, 134 S. Ct. 405, 407 (2013) (Sotomayor, J., dissenting from denial of certiorari).

Reliance on juries to safeguard against arbitrary and capricious government action is well rooted in our system's history:

> The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. . . . The framers of the constitutions strove to create

---

2. In 27 of the 31 states that maintain the death penalty, as well as the federal system, a death sentence may only be imposed by the jury. *See Woodward v. Alabama*, 134 S. Ct. 405, 407 n.2 (2013) (Sotomayor, J., dissenting from denial of certiorari). Only Florida, Alabama, Delaware and Montana leave the ultimate sentencing decision to the judge. *Id.* Nebraska, which formerly allowed judicial sentencing, abolished the death penalty by legislative act on May 27, 2015. *See* Leg. 268, 104th Leg., 1st Sess. (Neb. 2015).

> an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it. Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or group of judges. Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence.

Duncan v. Louisiana, 391 U.S. 145, 155-56 (1968) (footnote omitted).

In accord with the Eighth Amendment's heightened need for reliability, "the right to have an authentic representative of the community apply its lay perspective to the determination that must precede a deprivation of liberty [] applies with special force to the determination that must precede a deprivation of life." *Spaziano v. Florida*, 468 U.S. 447, 482-83 (1984) (Stevens, J., concurring in part and dissenting in part). "[T]he life-or-death decision in capital cases depends upon its link

to community values for its moral and constitutional legitimacy." *Id.* at 483. Having been charged with the grueling task of deciding the fate of numerous capital defendants, *Amici* believe the conclusion that a sentence of death is appropriate in a particular case is one far more fit for juries to make. The following important considerations have compelled us to believe that the Eighth Amendment requires that safeguard.

A. Whether Retribution Demands a Death Sentence is a Determination Best Made by a Jury.

While this Court has identified three societal functions served by capital punishment—deterrence, incapacitation, and retribution, *see Gregg*, 428 U.S. at 183—*Amici* are convinced that the primary justification for today's capital punishment system is retribution. *See Ring v. Arizona*, 536 U.S. 584, 614-15 (2002) (Breyer, J., concurring in judgment) (citing studies to demonstrate "the continued difficulty of justifying capital punishment in terms of its ability to deter crime [or] incapacitate offenders"); *Harris v. Alabama*, 513 U.S. 504, 517-18 (1995) (Stevens, J., dissenting) (dispelling rehabilitation, incapacitation, and deterrence justifications). "[C]apital punishment is an expression of society's moral outrage at particularly offensive conduct," *Gregg*, 428 U.S. at 183, and a sentence of death thus "expresses the community's judgment that no lesser sanction will provide an adequate response to the defendant's outrageous affront to humanity." *Harris*, 513 U.S. at 518 (Stevens, J., dissenting) (citing *Gregg*, 428 U.S. at 184).

Because retribution's goal is to reflect "society's and the victim's interest in seeing that the offender is

repaid for the hurt he caused," *Kennedy v. Louisiana*, 554 U.S. 407, 442 (2008) (citations omitted), and because the decision to deprive the defendant of his or her life is so unique in kind and severity, *Amici* believe that twelve representatives of the "community as a whole," *Panetti v. Quarterman*, 551 U.S. 930, 958 (2007), should be charged with determining whether retribution demands imposition of the death penalty through the deliberative process. As Justice Breyer notes in his concurrence in *Ring*, jurors "possess an important comparative advantage over judges . . [because] they are more likely to express the 'conscience of the community' on the ultimate question of life or death." *Ring*, 536 U.S. at 615-16 (Breyer, J., concurring in judgment) (citation omitted).

This point was recently underscored in an article by *Amicus* Judge O.H. Eaton, Jr., who has for many years taught a mandatory, week-long judicial training course for Florida trial judges newly-assigned to handle capital cases. *See* Judge O.H. Eaton, Jr., *Capital Punishment: A Failed Experiment (Part 2)*, 24 Florida Defender 56, 60-61 (Spring 2012). During the training, new judges are presented with a hypothetical case about the murder of a drug dealer involving three defendants of varying degrees of culpability. *Id.* at 60. At the end of the week, the student judges are asked what sentence they would impose for the most culpable of the defendants. *Id.* Over a twelve-year period (2001-2012), the judges' verdicts were split virtually down the middle every year: approximately 45 percent of the judges consistently voted to sentence the most culpable of the defendants to life in prison and 55 percent voted to sentence him to death. *Id.*

This statistical evidence, while not scientific, provides credible data that the sentence in a capital case has more to do with the judicial assignment than the facts of the

case. Each elected jurist comes to the bench with his or her own background, experience, and belief system, all likely to inform his or her verdict. As Judge Eaton's judicial course demonstrates, two judges can look at the same case, with the same set of facts, and reach different verdicts. While this is also the case for two jurors, we, as former trial judges who have grappled with such life-and-death decisions, believe that a sentence of death stemming from the considered judgment of twelve members of a jury engaging in the deliberative process is likely to be a more reliable representation of the community's moral values and conscience than one imposed by a single judge.

B. Because of the Central Role of Mitigation in Post-*Gregg* Capital Sentencing, the Decision Whether to Impose a Death Sentence Should Be Made by a Jury.

In the wake of *Gregg* and its companion cases, all American capital-sentencing procedures have integrated the weighing of aggravating against mitigating circumstances. Because the purpose of aggravating circumstances is to provide the sentencer with the guidance needed to "genuinely narrow the class of persons eligible for the death penalty" to those whose crimes warrant the most severe sentence, *Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988) (quoting *Zant v. Stephens*, 462 U.S. 862, 877 (1983)), the finding of an aggravating circumstance involves a fact-bound inquiry with relatively fixed, specific contours.[3] *See Tuilaepa v. California*, 512 U.S. 967, 973

---

3. The Sixth Amendment, as construed by this Court in *Ring v. Arizona*, 536 U.S. 584 (2002), requires that the finding of any aggravating circumstance which is the prerequisite for imposing a capital sentence be made by a jury.

(1994) ("Eligibility factors almost of necessity require an answer to a question with a factual nexus to the crime or the defendant . . . .").

Conversely, mitigating circumstances serve to ensure that capital offenders are treated "as uniquely individual human beings . [and not] as members of a faceless, undifferentiated mass to be subjected to the blind infliction of death." *Woodson*, 428 U.S. at 304. Thus, the consideration of mitigating circumstances must be wide-ranging and must take into account a vast array of circumstances that are not reducible to sharp-edged facts but involve complex, value-laden judgments. *See, e.g., Tennard v. Dretke*, 542 U.S. 274, 284 (2004) (holding no factual nexus to crime needed for mitigating evidence to be relevant).

For more than a third of a century now, it has been the rule that "the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion) (footnotes omitted); *accord, e.g., Hitchcock v. Dugger*, 481 U.S. 393, 399 (1986); *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986); *Eddings v. Oklahoma*, 455 U.S. 104, 114 (1982). The premise of this requirement is that "the sentence imposed at the penalty stage should reflect a reasoned *moral* response to the defendant's background, character, and crime." *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)); *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 263-64 (2007).

The consideration of mitigation as a basis for sparing a defendant's life involves judgments that are unique in the American criminal-justice system in two regards: they take account of a sweeping range of information, much of it irreducible to discrete, concrete, facts; and they explicitly, centrally focus upon *moral* judgment. *See Payne v. Tennessee*, 501 U.S. 808, 809 (1991) (noting there are "[v]irtually no limits" placed on relevant mitigating evidence); *Abdul-Kabir*, 550 U.S. at 236-64 ("[B]efore a jury can undertake the grave task of imposing a death sentence, it must be allowed to consider a defendant's moral culpability and decide whether death is an appropriate punishment . . . in light of his personal history and characteristics and the circumstances of the offense."). We believe that this kind of judgment must be made not by legal professionals, but by a jury of lay citizens if the death penalty is to comport with "'evolving standards of decency that mark the progress of a maturing society.'" *Roper v. Simmons*, 543 U.S. 551, 561 (2005) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)).

To be sure, this Court has been content to allow judicial factfinding in capital cases in certain contexts, including when the Court considered the retroactivity of *Ring*. *See Schriro v. Summerlin*, 542 U.S. 348, 355-56 (2004). But in *Schriro*, the issue under consideration was not whether jurors were more reliable capital sentencers than jurists, but whether judicial factfinding "'so seriously diminishe[d]'" accurate and reliable factual determinations of aggravating circumstances as to render them constitutionally assailable. *Id.* (applying and citing retroactivity standard in *Teague v. Lane*, 489 U.S. 288, 312-13 (1989)).

Conversely, the decision whether to impose a sentence of death, with its central focus upon the weighing of fact-based aggravating circumstances against "compassionate or mitigating factors stemming from the diverse frailties of humankind," *Woodson*, 428 U.S. 304-05, is so distinctly dependent upon contemporary community moral judgments that it must be made by the community's representatives – jurors – in order to ensure the reliability that the Eighth Amendment demands.[4]

C. The Advisory Jury under Florida's Death-Penalty Scheme Fails to Satisfy the Eighth Amendment's Reliability Requisite.

Throughout the century leading up to this Court's decision in *Furman*, Florida law required that juries render the final sentencing decisions in capital cases. *Spaziano*, 468 U.S. at 474 (Stevens, J., dissenting). This practice was mandated because juries "maintain a link between contemporary community values and the penal system – a link without which the determination of

---

4. Indeed, in *Schriro*, the Court distinguished the issue before it from the consideration at issue in this case: "The dissent contends that juries are more accurate because they better reflect community standards in deciding whether, for example, a murder was heinous, cruel, or depraved. . . . But the statute here does not condition death eligibility on whether the offense is heinous, cruel, or depraved as determined by community standards." *Schriro v. Summerlin*, 542 U.S. 348, 357 (2004) (citation omitted). By contrast, the Eighth Amendment requirement that a sentencer consider the "'compassionate or mitigating factors stemming from the diverse frailties of humankind,'" *Sumner v. Shuman*, 483 U.S. 66, 74 (1987) (citation omitted), *does* requires the application of "community standards."

punishment would hardly reflect 'the evolving standards of decency that mark the progress of a maturing society.'" *Witherspoon v. Illinois*, 391 U.S. 510, 519 n.15 (1968) (quoting *Trop*, 356 U.S. at 101)). Following *Furman*, the Florida Legislature transferred ultimate sentencing authority to trial judges, mandating independent judicial decision-making while retaining jury participation in the form of an advisory role. *See* Fla. Stat. § 921.141(2)-(3) (1973); *Proffitt v. Florida*, 428 U.S. 242, 247-51 (1976).

As Justice Stevens noted in his dissenting opinion in *Spaziano*, "[t]he change in the decision-making process that occurred in 1972 was not motivated by any identifiable change in the legislature's assessment of community values; rather it was a response to this Court's decision in *Furman*." *Spaziano*, 468 U.S. at 474 (Stevens J., dissenting) (citing Ehrhardt & Levinson, *Florida's Legislative Response to Furman: An Exercise in Futility?*, 64 J. Crim. L. & Criminology 10 (1973)). "Predictably, the variety of opinions supporting the judgment in *Furman* engendered confusion as to what was required in order to impose the death penalty in accord with the Eighth Amendment." *Lockett*, 438 U.S. at 599. The Florida Legislature was among those that misconstrued *Furman* as condemning all discretionary capital sentencing by juries, and it consequently looked to judicial sentencing as a corrective. The Florida Supreme Court early on appreciated that this fix-for-*Furman* had the drastic downside of detaching capital sentencing from contemporary community values. In its own attempt to navigate the "tension" between *Furman*'s perceived command of regularity and Anglo-American law's longstanding recognition of the role of compassionate mitigation as an element in capital sentencing, *see, e.g.*,

Penry, 492 U.S. at 319, the Florida Supreme Court recognized that the jury's advisory verdict "could be a critical factor in determining whether or not the death penalty should be imposed," *Lamadline v. State*, 303 So. 2d 17, 20 (Fla. 1974); and the Court accordingly attempted to enhance the significance of that verdict by declaring that a trial judge must give it "great weight." *Tedder v. State*, 322 So. 2d 908, 910 (Fla. 1975).

But this well-intended standard has proven impossible to employ reliably for two reasons. First, the jury's general verdict provides the sentencing judge with no specific findings regarding which aggravating and mitigating circumstances were found or how they were applied. *See* Fla. Stat. § 921.141(3). Second, as noted by *Amicus* Judge Eaton, Jr., "a definition of this subjective term, 'great weight,' is not contained in the statute or the case law." *Aguirre-Jarquin v. State*, 9 So. 3d 593, 611 (Fla. 2009) (Pariente, J., specially concurring). Trial judges charged with the discomforting duty to substitute their own moral judgment for the conscience of the community also must wrestle with the impossible task of applying an undefined term to an undefined verdict.[5] Thus, not only is

5. Jurors face a similarly obscure task, for they are asked to pay "due regard to the gravity" of the proceedings, but repeatedly informed that their verdict is a "recommendation," and "advisory," and that "the final decision as to which punishment shall be imposed is the responsibility of the judge. In this case, as the trial judge, that responsibility will fall on me." Fla. Std. Jury Instr. (Crim.) 7.11. Empirical studies reveal that the jury under this type of sentencing scheme feels little responsibility for its sentencing recommendation and that the deliberations are consequently short and less-than thorough. *See, e.g.*, William J. Bowers, *et al.*, *The Decision Maker Matters: An Empirical Examination of the Way the Role of the*

the reliability of Florida's capital sentencing compromised by severing the crucial "link [to] contemporary community values," *Witherspoon*, 391 U.S. at 519 n.15, it is further undermined by the uncertainty of requiring judges to give "great weight" to a jury's "essentially meaningless" advisory verdict when determining whether to impose the ultimate sentence. *Aguirre-Jarquin*, 9 So. 3d at 611-12.

Given that the decision whether to impose a death sentence goes far beyond a strict legal inquiry, a single elected trial judge cannot reliably supplant the deliberative moral judgment of twelve jurors representing the "conscience of the community." Although we believe that Florida's judges endeavor to perform this duty honorably and to the best of their abilities, it is our considered view that no single judge can accurately speak for the collective conscience of the community with the heightened degree of reliability that the Eighth Amendment requires.

Judge and the Jury Influence Death Penalty Decision-Making, 63 Wash. & Lee L. Rev. 931, 952-80 (2006). Were jurors to be charged with making the decision to impose a death sentence, the instructions would be changed, of course, with the likely result that jurors would understand their awesome task and deliberate accordingly, as they do in the vast majority of jurisdictions that require jury death sentencing. *Id.*

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of Florida should be reversed.

Respectfully submitted,

STUART L. HARTSTONE
ATTORNEY AT LAW
STUART L. HARTSTONE, P.A.
5112 Ventura Drive
Delray Beach, Florida 33484
(607) 227-8051

SONYA RUDENSTINE
ATTORNEY AT LAW
Counsel of Record
2531 N.W. 41st Street, Suite E
Gainesville, Florida 32606
(352) 374-0604
srudenstine@yahoo.com

Counsel for Amici Curiae

June 4, 2015

No. 14-7505

Supreme Court, U.S.
FILED
JUN - 4 2015
OF THE CLERK

IN THE

Supreme Court of the United States

TIMOTHY LEE HURST,

Petitioner,

v.

FLORIDA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF OF *AMICI CURIAE* FORMER JUSTICES OF THE SUPREME COURT OF FLORIDA IN SUPPORT OF PETITIONER

KAREN M. GOTTLIEB
Counsel of Record
STEPHEN K. HARPER
CO-DIRECTORS, FLORIDA CENTER FOR CAPITAL REPRESENTATION AT FLORIDA INTERNATIONAL UNIVERSITY COLLEGE OF LAW
11200 S.W. 8th Street RDB 1010
Miami, FL 33199
kgottlie@fiu.edu

Counsel for Amici Curiae

259880

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

Library of Congress
Law Library

TABLE OF CONTENTS

Page

TABLE OF CONTENTS... i

TABLE OF CITED AUTHORITIES iii

INTERESTS OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT... 2

ARGUMENT... 5

FLORIDA'S DEATH-SENTENCING SCHEME VIOLATES THE SIXTH AND THE EIGHTH AMENDMENTS IN LIGHT OF THIS COURT'S DECISION IN *RING V. ARIZONA*, 536 U.S. 584 (2002) 5

A. Overview..... 5

B. Every Florida jury recommendation is devoid of factual findings and therefore "essentially meaningless" for the sentencing judge, who must independently find the aggravating and mitigating circumstances in imposing a sentence to death.. 8

C. After *Ring v. Arizona*, 536 U.S. 584 (2002), the Supreme Court of Florida continues to uphold death sentences in cases in which there is no indication that even a majority of the jury found any single aggravating circumstance.... ...11

Table of Contents

Page

D. A Florida death sentence may be based on evidence and aggravating circumstances never presented to the advisory jury 15

E. The Florida death-penalty scheme cannot withstand constitutional scrutiny ..... .19

CONCLUSION 22

TABLE OF CITED AUTHORITIES

Page

Cases

Aguirre-Jarquin v. State,
9 So. 3d 593 (Fla. 2009) .... *passim*

Baker v. State,
71 So. 3d 802 (Fla. 2011) 17

Barclay v. Florida,
463 U.S. 939 (1983)... 5

Bottoson v. Moore,
833 So. 2d 693 (Fla. 2002)..... 6

Brooks v. State,
918 So. 2d 181 (Fla. 2005) 19

Butler v. State,
842 So. 2d 817 (Fla. 2003) 11, 12, 13

Caldwell v. Mississippi,
472 U.S. 320 (1985). 6

Coday v. State,
946 So. 2d 988 (Fla. 2006)... .... .10

Davis v. State,
703 So. 2d 1055 (Fla. 1998) ... .16

Davis v. State,
859 So. 2d 465 (Fla. 2003)..... 7

Cited Authorities

Page

Echols v. State,
484 So. 2d 568 (Fla. 1985) 7, 16

Engle v. State,
438 So. 2d 803 (Fla. 1983) 15, 16

Fitzpatrick v. State,
437 So. 2d 1072 (Fla. 1983) 16

Hoffman v. State,
474 So. 2d 1178 (Fla. 1985) 16

Hurst v. State,
147 So. 3d 435 (Fla. 2014) 14

Jones v. State,
845 So. 2d 55 (Fla. 2003) 17

Mills v. Maryland,
486 U.S. 367 (1988) 7

Peterson v. State,
94 So. 3d 514 (Fla. 2012) 13

Porter v. State,
400 So. 2d 5 (Fla. 1981) 18

Porter v. State,
429 So. 2d 293 (Fla. 1983) 18

Porter v. State,
723 So. 2d 191 (Fla. 1998) 17, 18

Cited Authorities

Page

Proffitt v. Florida,
428 U.S. 242 (1976).... 7

Ring v. Arizona,
536 U.S. 584 (2002) ... . *passim*

Shellito v. State,
701 So. 2d 837 (Fla. 1997) 17

Sims v. State,
681 So. 2d 1112 (Fla. 1996) .... .16

Sochor v. Florida,
504 U.S. 527 (1992)..... 6

Songer v. State,
322 So. 2d 481 (Fla. 1975) 17

Spaziano v. State,
393 So. 2d 1119 (Fla. 1981) 7

Spencer v. State,
615 So. 2d 688 (Fla. 1993) 9, 18, 19

State v. Dixon,
283 So. 2d 1 (Fla. 1973) 5

State v. Evans,
2012 WL 12012753 (Fla. Cir. Ct. May 30, 2012). .17

Page

State v. Steele,
921 So. 2d 538 (Fla. 2006).... ..... .9, 10, 20, 21

Sumner v. Shuman,
483 U.S. 66 (1987).. 22

Troy v. State,
948 So. 2d 635 (Fla. 2006)..... 18

White v. State,
403 So. 2d 331 (Fla. 1981) 17

Williams v. State,
967 So. 2d 735 (Fla. 2007)..... 15

Statutes and Other Authorities

Section 921.141(3), Florida Statutes (2015)..... ...6

Section 921.141(4), Florida Statutes (2015)..... 7

Supreme Court Rule 37.3.(a) 1

Supreme Court Rule 37.6 1

Fla. Std. Jury Instr. (Crim.) 7.11..... 6

INTERESTS OF *AMICI CURIAE*[1]

Amici are former Justices of the Supreme Court of Florida. Two *Amici* were also appellate judges on an intermediate appellate court in Florida, the District Court of Appeal, and two were trial judges in Florida's highest trial court, the Circuit Court. One *amicus* was a state prosecutor and, in that capacity, prosecuted capital cases. All possess extensive expertise and experience with Florida's death-penalty regime, having served on the Supreme Court of Florida, in which the direct and the collateral appeals in every Florida capital case are heard. All are keenly interested in the outcome of this case and believe that their expertise and experience can assist the Court in assessing the merits of this cause.

Harry Lee Anstead was a trial and appellate attorney until 1977, when he joined the Fourth District Court of Appeal, on which he served as Chief Judge. He was appointed to the Florida Supreme Court in 1994, and in 2002 became Florida's 50th Chief Justice. Justice Anstead retired from the Court in 2009.

Rosemary Barkett was appointed to the Circuit Court in 1979, and to the Fourth District Court of Appeal in 1984. In 1985, Justice Barkett became the first woman appointed to the Florida Supreme Court, and she later became the first female Chief Justice of that Court. In 1994, Justice

---

1. Pursuant to Supreme Court Rules 37.3.(a) and 37.6, *Amici Curiae* certify that no counsel for a party authored this brief in whole or part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of the brief, and that the parties have consented to the filing of this brief in letters on file with the Clerk's office.

Barkett was named to the United States Court of Appeals for the Eleventh Circuit, on which she served until 2013, at which time she joined the Iran-United States Claims Tribunal, on which she presently serves.

Gerald Kogan was a prosecutor in the Miami-Dade State Attorney's office from 1960-1967, during which time he became the chief prosecutor of the Homicide and Capital Crimes Division. In 1980, Justice Kogan was appointed to the Circuit Court, and in 1984, he was appointed administrative judge of that court's criminal division. Justice Kogan was appointed to the Florida Supreme Court in 1987, on which he served as Chief Justice from 1996 until his retirement from the Court in 1998.

SUMMARY OF ARGUMENT

Ring v. Arizona establishes that a jury, not a judge, must find the aggravating circumstances that a State makes the prerequisite for eligibility for a death sentence. Florida mandates a finding of one or more aggravating circumstances to satisfy that prerequisite. But in practice, Florida death sentences are not based on a jury's factual findings.

The Florida jury's general verdict recommending either a life or death sentence is "essentially meaningless" for the trial judge, because it reveals nothing about what the jury factually found. Instead, Florida's death-penalty statute requires that the trial judge independently make the findings of fact on which the death sentence is based. The Supreme Court of Florida then reviews only the trial judge's findings to determine the propriety of the death

sentence. And neither the trial court nor the Florida Supreme Court is limited to the evidence that was before the jury.

The Florida death-penalty scheme thus accepts —even encourages—incongruity between the jury's findings and those on which the trial judge predicates a death sentence. Florida Supreme Court precedent precludes a specific verdict that would reveal which or how many aggravating circumstances were found by the jury and by how many votes. The Court has authorized a second sentencing hearing after the jury returns its sentencing recommendation at which additional evidence on aggravating and mitigating circumstances can be presented to the trial judge. The Court permits a trial judge to impose, and the Court itself to uphold, a death sentence based on aggravating circumstances that were never argued to the jury, based on evidence that the jury never heard.

Indeed, death sentences are upheld in Florida in cases in which there is no evidence that even a majority of the jury agreed that any particular aggravating circumstance had been proved. Mr. Hurst's case is one such example. The jury vote was 7-5 for a death sentence. Two aggravating circumstances were presented to the jury. With only the jury's general sentencing verdict, it is possible that not even a majority of the jurors agreed that any one aggravator had been established.

The Florida Supreme Court has acknowledged the tension between *Ring* and Florida's death-penalty process. The Court also has observed that Florida is an outlier—it is the only death-penalty jurisdiction that

fails to require unanimity in either the jury finding of at least one aggravating circumstance or the jury's ultimate sentencing recommendation. The Florida Supreme Court has called upon the Legislature to re-examine the statute, recognizing that the Florida death-penalty scheme may not withstand constitutional scrutiny and that unanimous verdicts play a vital role in ensuring reliability in the deliberation process, but to no avail.

Because the Florida death-penalty regime precludes a special verdict disclosing the jury's sentencing findings, and because there is no symmetry required between that which the jury considers in aggravation and that which the courts consider, there is no assurance that Florida death sentences are premised on a particular aggravating circumstance found by the jury. And because jury unanimity is not mandated during the sentencing process, there is no assurance that a Florida jury's death recommendation represents a reliable consensus of the community. As a consequence, *Amici* believe that the jury's role is impermissibly denigrated and that there is an unacceptable risk that Florida death sentences are erroneously imposed, in violation of the Sixth and the Eighth Amendments to the Constitution of the United States.

ARGUMENT

FLORIDA'S DEATH-SENTENCING SCHEME VIOLATES THE SIXTH AND THE EIGHTH AMENDMENTS IN LIGHT OF THIS COURT'S DECISION IN *RING V. ARIZONA*, 536 U.S. 584 (2002).

A. Overview.

Amici are former Justices of the Supreme Court of Florida. While we have varying views on the efficacy and appropriateness of capital punishment, we speak with one voice on this matter. We believe that Florida's death-penalty scheme, as currently administered, impermissibly deviates from both the national norm and that which this Court's precedent and the Sixth and Eighth Amendments to the Constitution mandate.

As this Court elucidated in *Ring v. Arizona*, 536 U.S. 584, 609 (2002), the Sixth Amendment requires that a jury, not a judge, factually find the aggravating circumstances that a State makes the necessary preconditions for a death sentence. Under Florida law, a finding of one or more aggravating circumstances serves as that prerequisite. *Barclay v. Florida*, 463 U.S. 939, 954 (1983) (Florida statute "requires the sentencer to find at least one valid statutory aggravating circumstance before the death penalty may even be considered"); *State v. Dixon*, 283 So. 2d 1, 9 (Fla. 1973) (aggravating circumstances "actually define those crimes" for which death may be imposed in the absence of mitigation).

But Florida death sentences are not been premised on a jury's factual findings. Instead, the jury's sentencing

role under the Florida death-penalty scheme is minimized at every step. As *Amici* have seen in cases that we have reviewed, from the prosecutor's voir dire to his or her sentencing argument, from the jury instructions to the sentencing verdict form, the capital jury is told again and again that, while its verdict will be given great weight, its role is merely advisory, for the final decision is the responsibility of the trial court alone. *See* Fla. Std. Jury Instr. (Crim.) 7.11.[2] And the jury's conclusions are masked behind an advisory general verdict that reveals little to the trial judge or the Supreme Court of Florida about what, if anything, the jury factually found. *See Sochor v. Florida*, 504 U.S. 527, 538 (1992) ("the jury in Florida does not reveal the aggravating circumstances on which it relies.").

Unlike the capital punishment statutes in other States or under the federal system, Florida's regime ensures that only the trial judge's factual findings are knowable. Section 921.141(3), Florida Statutes (2015), provides for "Findings in Support of Sentence of Death" – but only by the trial judge -- who is charged with the duty of entering "specific written findings of fact" to support the death sentence "notwithstanding the recommendation of

---

2. Florida's penalty-phase jury instructions "in which the role of the jury is minimized," *Bottoson v. Moore*, 833 So. 2d 693, 732 (Fla. 2002) (Lewis, J., concurring in result only) – use the terms "'advise' and 'advisory' more than ten times." *Id* at 733. Instead of attaching any controlling significance to the jury's aggravating findings, the instructions repeatedly remind the jury that the responsibility for the death sentence "rests elsewhere." *Id.* at 731 (quoting *Caldwell v. Mississippi*, 472 U.S. 320, 328-29 (1985); *accord Bottoson*, 833 So. 2d at 723 (Pariente, J., concurring in result only).

a majority of the jury." Only the factual findings of the trial judge are then reviewed by the Florida Supreme Court. Section 921.141(4), Florida Statutes (2015); *Proffitt v. Florida*, 428 U.S. 242, 251-252 (1976) (Florida death sentence is "determined by the trial judge rather than by the jury" and it is the trial judge who must "justify the imposition of a death sentence with written findings.").

In making sentencing findings, the trial judge is not limited to evidence presented to the advisory jury. To the contrary, trial judges have long considered additional evidence and relied on that evidence in finding aggravating circumstances justifying a death sentence. *E.g.*, *Spaziano v. State*, 393 So. 2d 1119, 1121 (Fla. 1981). The Supreme Court of Florida, too, has relied on evidence that the jury never heard, and has looked to such evidence in considering the propriety of a death sentence. *See Echols v. State*, 484 So. 2d 568, 576-77 (Fla. 1985). Accordingly, it is impossible to ensure that all Florida defendants are sentenced to death based on the jury's factual finding of at least one aggravating circumstance, as the Sixth Amendment mandates.[3] What the jury's opaque and unaccountable verdict adds to Florida capital trials is simply a level of confusion that heightens the "risks [of] erroneous imposition of the death sentence." *Mills v. Maryland*, 486 U.S. 367, 375 (1988).

---

3. *Amicus* former Chief Justice Anstead stated in no uncertain terms "that Florida's sentencing scheme, as written, relies on judges to find the aggravating circumstances necessary to impose the death sentence." *Davis v. State*, 859 So. 2d 465, 481 (Fla. 2003) (Anstead, C.J., dissenting).

B. Every Florida jury recommendation is devoid of factual findings and therefore "essentially meaningless" for the sentencing judge, who must independently find the aggravating and mitigating circumstances in imposing a sentence to death.

Judge O. H. Eaton, "one of our most experienced trial judges in death penalty cases," *Aguirre-Jarquin v. State*, 9 So. 3d 593, 611 (Fla. 2009) (Pariente, J., specially concurring), pointed out the inadequacy of the jury-sentencing verdict. Addressing the jury death recommendations in a double-homicide case, by a 7-5 and 9-3 vote, Judge Eaton lamented that the verdict form provided no guidance on what the jury factually found:

> The jury recommendation does not contain any interrogatories setting forth which aggravating factors were found, and by what vote; how the jury weighed the various aggravating and mitigating circumstances; and, of course, no one will ever know if one, more than one, any, or all of the jurors agreed on any of the aggravating and mitigating circumstances. It is possible, in a case such as this one, where several aggravating circumstances are submitted, that none of them received a majority vote.

Id. at 611-12 (quoting Judge Eaton's sentencing order).

A jury death recommendation is thus "essentially meaningless to the trial judge, especially if the parties present additional aggravating and mitigating circumstances" at the second sentencing hearing held

before the trial judge only. *Id.* at 612.[4] Judge Eaton acknowledged a Florida judge's responsibility to make the ultimate sentencing findings "independent" of whatever the jury had found. *Id.* And his factual findings on the aggravating circumstances in support of the death sentences notably included a circumstance on which the advisory jury had never been instructed, while excluding a circumstance on which the jury had specifically been charged. *Id.* at 607-08 (majority opinion).

The Florida Supreme Court nonetheless upheld these death sentences.For the Florida death-penalty scheme readily tolerates incongruity between the jury's factual findings and the findings on which the trial judge premises the sentence to death. Indeed, the Florida Supreme Court condemned, as a "departure from the essential requirements" of Florida law, a trial judge's proposal to provide the jury with special verdicts detailing the aggravating factors found and the jury's vote on those factors. *State v. Steele*, 921 So. 2d 538 (Fla. 2006). The Court stated that, because a trial judge must independently assess the sentencing circumstances, specific jury findings on aggravators "could unduly influence the trial court's own determination of how to sentence the defendant," *id.* at 546:

---

4. In *Spencer v. State*, 615 So. 2d 688, 691 (Fla. 1993), the Court addressed the death-sentencing protocol, specifying that an essential component is a sentencing hearing after the jury's recommendation, now known as the "*Spencer* hearing," at which the trial judge must "afford, if appropriate, both the State and the defendant an opportunity to present additional evidence;" and "allow both sides to comment on or rebut information in any presentence or medical report."

> Our current system fosters independence because the trial court alone must make detailed findings about the existence and weight of aggravating circumstances; it has no jury findings on which to rely. Individual jury findings on aggravating factors would contradict this settled practice.

Id.

The Court made clear that, under the Florida death-penalty regime, there is no requirement that a majority of the jurors agree on which aggravating circumstances have been proved, so long as a majority concludes that at least one has been established. "Under the current law, for example, the jury may recommend a sentence of death where four jurors believe that only [aggravating circumstance a] applies, while three others believe that only [aggravating circumstance b] applies, because seven jurors believe that at least one aggravator applies." *Id.* at 545 (citations omitted). Requiring a majority vote on any particular aggravating factor would contravene Florida law, as would requiring the jury to tell the trial judge which factors it found. *Id.* at 546-47.[5]

---

5. The Court later reaffirmed that "[i]n *Steele*, we not only concluded, consistent with prior caselaw, that section 921.141, Florida Statutes, does not require jury findings on aggravating circumstances, we specifically held that it is a departure from the essential requirements of law to use a special verdict form detailing the jury's determination on the aggravating circumstances." *Coday v. State*, 946 So. 2d 988, 1005 (Fla. 2006).

C. After *Ring v. Arizona*, 536 U.S. 584 (2002), the Supreme Court of Florida continues to uphold death sentences in cases in which there is no indication that even a majority of the jury found any single aggravating circumstance.

Amici are aware that a Florida death sentence may be upheld in cases in which one aggravating circumstance is argued to the advisory jury and there is no evidence that the jury unanimously found that aggravating circumstance. *Amici* are aware of other cases in which the death sentence is upheld where multiple aggravating circumstances are argued to the jury and there is no evidence that even a majority of the jurors agreed that one aggravating circumstance had been proved. Because Florida law does not permit special sentencing verdicts by the advisory jury and fails to require any jury unanimity at the death-sentencing stage, either on the aggravating factors or the sentencing recommendation, it is impossible reliably to discern a jury's factual findings or ensure that the sentencing recommendation represents a community consensus.

A few examples of cases in which the death penalty has been imposed and subsequently upheld on appeal underscore the problem. In a case in which the trial court found only one aggravating circumstance, in addition to mitigation, the Florida Supreme Court upheld the death sentence despite an erroneous jury instruction that directed the jury to consider the one aggravator "that *is* established by the evidence." *Butler v. State*, 842 So. 2d 817, 830-31 (Fla. 2003) (emphasis added). The case involved a domestic dispute in which the defendant, who was the father of the decedent's child, became distraught

over her affair with another man, and confronted her and repeatedly stabbed her to death. Evidence showed that the defendant's mother had been killed when he was eight, that his father had been tried for, but acquitted of, the murder, and that the defendant had been drinking and using cocaine on the night of the homicide. *Id.* at 822 (majority opinion); *id.* at 840 (Pariente, J., dissenting).

The jury voted 11-1 to recommend death, with no indication that it had made a factual finding of the sole aggravator presented. The four-justice majority approved the death sentence after the defendant on rehearing called to the Court's attention the then-new *Ring* decision. *Id.* at 834 (majority opinion).

Justice Pariente dissented from the decision to uphold the death sentence in an opinion joined by two justices, and wrote of the jury's recommendation:

> In this case, we cannot be certain that the recommendation reflects a finding of the existence of the single aggravating circumstance submitted to the jury. The trial court instructed the jury to consider the single aggravating circumstance "that *is* established by the evidence" rather than "*if* it is established by the evidence." Because of the trial judge's misstatement, it cannot now be determined whether the jury found that the HAC aggravator existed, as required for a death recommendation, or whether its advisory sentence reflects a mistaken perception that the judge had already found the existence of the aggravator.

Id. at 837 (Pariente, J., dissenting) (footnote and citation to majority opinion omitted).

In a more recent capital case, the Court, in a 4-3 decision, upheld a death sentence premised on three aggravating circumstances, despite the presence of mitigation. *Peterson v. State*, 94 So. 3d 514 (Fla. 2012). The decedent was the defendant's stepfather who had been abusing the defendant's mother, had instructed her not to give the defendant money, and had forced him to move out of the house. The decedent was beaten about the head and shot twice. *Id.* at 519. By a 7-5 vote, the jury recommended a death sentence. *Id.* at 523.

In her dissenting opinion, which was joined by two justices, Justice Pariente explained that none of the three aggravators "automatically demonstrate[s] the jury has made the necessary findings to warrant the possibility of a death sentence, such as a prior violent felony or that the murder occurred while in the course of an enumerated felony that was also found by the jury." *Id.* at 538 (Pariente, J., dissenting). Additionally -- particularly because the jury recommended a death sentence by a bare majority -- "[i]t is possible that there was no majority of jurors who agreed that the same aggravator applied." *Id.* at 540. Since the maximum penalty for first-degree murder is life without parole eligibility, and "the death penalty cannot be imposed unless and until additional factual findings are made as to the existence of aggravators—a decision that the jury must make," *id.* , the death sentence was wrongly upheld.

Mr. Hurst's death sentence suffers from an identical flaw. Again over three justices' dissent and on a 7-5 jury

vote for death, the Florida Supreme Court upheld the death sentence predicated on two aggravating factors, notwithstanding substantial mitigation. *Hurst v. State*, 147 So. 3d 435 (Fla. 2014). The case involves a robbery at a Popeye's restaurant by a restaurant employee, during which another employee was fatally stabbed with a box cutter.

Justice Pariente again dissented, in an opinion joined by two justices, and underscored that not all defendants convicted of first-degree murder are eligible for a death sentence; an additional factual finding is required. In holding that Hurst's death sentence could not be reconciled with *Ring* because there was no assurance that the requisite factual finding had been made by the jury, the justice expounded:

> In Hurst's case, the jury recommended death by the slimmest margin permitted under Florida law – a bare majority seven-to-five vote. Because a penalty-phase jury in Florida is not required to make specific factual findings as to the aggravating circumstances necessary to impose the death penalty pursuant to Florida's capital sentencing statute, it is actually possible that there was not even a majority of jurors who agreed that the same aggravator applied.

Id. at 449 (Pariente, J., dissenting) (citation omitted).

D. A Florida death sentence may be based on evidence and aggravating circumstances never presented to the advisory jury.

We believe that there is another significant problem with Florida's scheme. Florida law not only fails to require that the jury make the factual findings that *Ring* deems essential, it also refrains from requiring symmetry between the trial judge's and the jury's aggravating-circumstance findings. Thus, because trial judges independently impose a death sentence, the judge is not precluded from justifying a death sentence based on evidence and aggravating circumstances that were never before the jury. *Amici* believe that this asymmetry can result in death sentences being imposed and upheld for reasons not found, or even rejected, by the advisory jury.

Even after this Court's *Ring* decision, the Florida Supreme Court has insisted that it is not improper for a trial court to consider aggravating circumstances that were not presented to the jury. *Williams v. State*, 967 So. 2d 735, 751 (Fla. 2007). In rejecting the defendant's claim that the trial court improperly found an aggravator that was never argued to the jury, the Court reaffirmed that it "has held that it is not error for a judge to consider and find an aggravator that was not presented to or found by the jury." *Id.* (citation omitted); *but see id.* at 67-68 (Pariente, J., concurring) (cautioning trial courts to refrain from finding aggravating circumstances on which the jury was not instructed).

Nor is this practice new. In *Engle v. State*, 438 So. 2d 803, 813 (Fla. 1983), a case on which the *Williams* Court relied, the Court upheld the override of a jury's

life recommendation even though the trial judge relied on two aggravating circumstances that were never before the jury. In rejecting the defendant's contention that he should be allowed "to have the existence and validity of aggravating circumstances determined as they were placed before his jury," *id.*, the Court rebuffed the suggestion that trial judges should be confined by the jury advisory proceedings:

> The trial judge, however, is not limited in sentencing to consideration of only that material put before the jury, is not bound by the jury's recommendation, and is given final authority to determine the appropriate sentence. Prior cases make it clear that during sentencing, evidence may be presented as to any matters deemed relevant, and that a trial judge may consider information, such as presentence and psychological reports, which were not considered by the jury during its sentencing deliberations.

Id. (citations omitted).

The Supreme Court of Florida continues to permit trial judges to impose death sentences based on aggravating circumstances that the trial judges alone found. *Davis v. State*, 703 So. 2d 1055, 1061 (Fla. 1998); *Sims v. State*, 681 So. 2d 1112, 1118 (Fla. 1996); *Hoffman v. State*, 474 So. 2d 1178 (Fla. 1985); *Fitzpatrick v. State*, 437 So. 2d 1072, 1078 (Fla. 1983). And that Court itself has looked beyond the trial judge's aggravating-circumstance findings in upholding a death sentence. *Echols v. State*, 484 So. 2d 568, 576-77 (Fla. 1985).

Additional evidence that was never offered to the jury can also form the basis for trial-court findings on the aggravating circumstances. The routine practice of securing PSI reports after the capital jury renders its sentencing recommendation continues in Florida, albeit with new implications following *Ring*. *See, e.g.*, *Baker v. State*, 71 So. 3d 802, 813 (Fla. 2011); *Jones v. State*, 845 So. 2d 55, 73 (Fla. 2003); *Shellito v. State*, 701 So. 2d 837, 843 (Fla. 1997); *State v. Evans*, 2012 WL 12012753, *2-3 (Fla. Cir. Ct. May 30, 2012). Indeed, the Florida Supreme Court early on rejected any notion that trial judges should refrain from relying on a PSI conducted after the jury advisory proceeding in finding aggravating circumstances justifying the death sentence. *Songer v. State*, 322 So. 2d 481, 483-84 (Fla. 1975).

The Supreme Court of Florida has expressly authorized a sentencing court's reliance on the PSI for its aggravating-circumstance findings. For example, in *White v. State*, 403 So. 2d 331, 339 (Fla. 1981), the Court upheld the death sentence despite the jury's recommendation for life imprisonment on a vote of 12-0. The Court explicated that the "trial judge noted that as a result of the presentence investigation and information presented at sentencing he was made aware of a number of factors which the jury did not have an opportunity to consider." *Id.* at 339-40 (footnote omitted). As a result, the Court upheld the jury override where the trial court found two aggravating circumstances that were never presented to the jury.

This practice of predicating a death sentence on information that the jury never heard was reaffirmed in *Porter v. State*, 429 So. 2d 293 (Fla. 1983). After the Court

initially ordered a trial-judge re-sentencing because the judge had relied on a deposition to support the aggravating circumstances without notifying defense counsel, *Porter v. State*, 400 So. 2d 5, 7 (Fla. 1981), the judge re-imposed a death sentence, again using the deposition to support two of the three aggravating circumstances found. *Porter*, 429 So. 2d at 295-96. The Court affirmed, explaining that the decision to override the jury's life recommendation was justified in part because the trial court had access to the "deposition, which the jury did not see." *Id.* at 296.

Following the re-sentencing, the Court ordered yet another re-sentencing due to the bias of the original trial judge, but explained that empaneling a new jury was unnecessary. *Porter v. State*, 723 So. 2d 191, 196 (Fla. 1998). Emphasizing that "the judge is the sentencing authority and the jury's role is merely advisory," *id.*, the Court pointed out that a trial judge's death sentence is predicated on "the record before the jury but also upon the record as developed at the part of [the] sentencing proceeding that is solely before the trial judge." *Id.* at 198.

Moreover, the Florida Supreme Court, as previously noted, has explicitly endorsed the practice of holding a second sentencing proceeding before only the trial judge at which additional evidence may be presented for and against a death sentence, *Spencer v. State*, 615 So. 2d 688, 690-91 (Fla. 1993), a practice that continues in the aftermath of *Ring*. *E.g.*, *Troy v. State*, 948 So. 2d 635, 648-49 (Fla. 2006). The *Spencer* Court clarified that Florida's death-penalty scheme contemplates that a trial judge conducts this sentencing hearing after the jury advisory proceeding, and that at this hearing, both sides where appropriate should be afforded an opportunity to

present further evidence. *Id.* at 691. Evidence adduced at this "*Spencer* hearing" may be considered by the court in formulating its findings justifying a death sentence. *See Brooks v. State*, 918 So. 2d 181, 209 (Fla. 2005) (testimony introduced only before trial court at *Spencer* hearing used to sustain determination that defendant inflicted the fatal blow).

E. The Florida death-penalty scheme cannot withstand constitutional scrutiny.

The utter speculation on what the advisory jury found and the numerous permutations of possibilities eviscerate any prospect for a reliable death sentence that is appropriately reverent of the jury's fact-finding role. As a consequence, *Amici* believe that Florida has deviated from, not only the national norm, but from the guarantees enshrined in the Sixth and Eighth Amendments to the Constitution. As Judge Eaton so eloquently elaborated:

> The jury makes no findings of fact as to the existence of aggravating or mitigating circumstances, nor what weight should be given to them, when making its sentencing recommendation. The jury is not required to unanimously find a particular aggravating circumstance exists beyond a reasonable doubt. It makes the recommendation by majority vote, and it is possible that none of the jurors agreed that a particular aggravating circumstance submitted to them was proven beyond a reasonable doubt.

* * *

> A sentencing order should reflect the trial judge's independent judgment about the existence of aggravating and mitigating factors and the weight each should receive.
>
> * * *
>
> Florida trial judges are bound to follow precedent laid down by the Supreme Court of Florida. That Court has taken the position that the Florida capital punishment scheme is constitutionally valid unless and until the United States Supreme Court declares otherwise. Following that precedent, knowing the obvious due process problems with Florida's death penalty scheme, certainly tests the resolve of trial judges, who must decide who will live and who will die.

Aguirre-Jarquin v. State, 9 So. 3d at 612 (Pariente, J., specially concurring) (quoting Judge Eaton) (citations omitted).

The Florida Supreme Court has recognized the obvious tension between *Ring* and Florida's death-penalty statute, as well as Florida's outlier status as the only State that requires no jury unanimity in its death-sentencing regime. *State v. Steele*, 921 So. 2d at 550, 552-53. Writing for a unanimous Court, Justice Cantero lauded the value of unanimous verdicts that induce "a jury to deliberate thoroughly and help[] to assure the reliability of the ultimate verdict," *id.* at 549 (citation omitted), and called upon the Legislature to re-examine the statute:

> [W]e express our considered view, as the court of last resort charged with implementing Florida's capital sentencing scheme, that in light of developments in other states and at the federal level, the Legislature should revisit the statute to require some unanimity in the jury's recommendations.
>
> * * *
>
> The bottom line is that Florida is now the *only* state in the country that allows the death penalty to be imposed even though the penalty-phase jury may determine by a mere majority vote *both* whether aggravators exist and whether to recommend the death penalty. Assuming that our system continues to withstand constitutional scrutiny, we ask the Legislature to revisit it to decide whether it wants Florida to remain the outlier state.

Id. at 548, 550.

But the Florida Legislature has refused to act. As a result, trial judges in Florida continue to decide independently whether to impose a life or death sentence without the input of factual findings by the jury, and thus, with only the jury's "essentially meaningless" assistance. *Aguirre-Jarquin v. State*, 9 So. 3d at 612 (Pariente, J., dissenting) (quoting Judge Eaton's sentencing order). *Amici* are keenly aware of the Sixth Amendment's "veneration for the protection of the jury in criminal cases," *Ring v. Arizona*, 536 U.S. at 612 (Scalia, J., concurring), as well as the "heightened reliability demanded by the Eighth

Amendment" in a capital case. *Sumner v. Shuman*, 483 U.S. 66, 72 (1987) (citations omitted). Without any jury-unanimity requirement in the death-penalty process and without a special verdict disclosing the jury's sentencing findings, judges in this State, as one experienced trial judge analogized, are left to make this ultimate sentencing decision by "fishing in the dark." *Aguirre-Jarquin*, 9 So. 3d at 611 (citation omitted).

CONCLUSION

Amici urge the Court to hold that Florida's death-penalty scheme fails to meet the requirements of the Sixth and Eighth Amendments in light of *Ring v. Arizona*, and to reverse the Florida Supreme Court's judgment and order the vacatur of Mr. Hurst's death sentence.

Respectfully submitted,

KAREN M. GOTTLIEB
Counsel of Record
STEPHEN K. HARPER
CO-DIRECTORS, FLORIDA CENTER FOR CAPITAL REPRESENTATION AT FLORIDA INTERNATIONAL UNIVERSITY COLLEGE OF LAW
11200 S.W. 8th Street RDB 1010
Miami, FL 33199
kgottlie@fiu.edu

Counsel for Amici Curiae